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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1462

DELAWARE REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,

v.

B. WILSON REDFEARN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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The petitioners, Delaware Republican State Committee, Eugene Bunting, Chairman, Basil R. Battaglia, Raymond T. Evans, Mary L. Sims, Alexander DeStephano, and Jane Baddorf, respectfully pray that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 14, 1975.

OPINIONS BELOW

1. There is no published opinion of the United States Court of Appeals, Third Circuit, from which petitioners are now appealing. However, attached hereto, as Appendix A, is a copy of the Judgment Order issued by that Court.

2. The earlier opinion of the Court of Appeals, reversing and remanding, is published at 502 F.2d 1123 (1974).

3. The opinions of the United States District Court for the District of Delaware are published at 393 F.Supp. 372 (1975) and 362 F.Supp. 65 (1973).

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the voluntary association of individuals at a major party's state political convention is a guaranteed freedom of the First Amendment of the Federal Constitution.

2. Whether the one man-one vote principle of *Baker v. Carr* has application to delegate representation at a major party's state political convention.

3. Whether the delegate apportionment formula projected for use at the Delaware Republican State Convention contains permissible deviations from mathematical equality and whether those deviations are

justified by some legitimate and rational interest of the Delaware State Republican Party.

4. Whether the selection of a state party's delegate apportionment formula for its state convention constitutes an internal political party deliberation calculated to serve party interests.

5. Whether the issues presented by this case involve justiciable questions subject to resolution by Federal Courts.

6. Whether there were viable judicial alternatives to the granting of declaratory relief against a state political party's internal rule affecting its convention delegation.

7. Whether the District Court had jurisdiction of this case under 28 U.S.C. § 1343(3) and (4), or otherwise.

8. Whether there was sufficient state action present in this case to justify the District Court's intervention into the internal affairs of a voluntary political association.

STATEMENT OF THE CASE

This petition results from a continuing controversy within the Delaware State Republican Party. Petitioners (defendants-appellants below) are the Delaware State Republican Committee, its chairman, members and certain persons who were permitted to intervene by the District Court. The respondents (plaintiffs-appellees below) are registered Republicans residing in New Castle County, Delaware, Republican State Convention District #2. Respondents initiated litigation in an attempt to compel changes in the delegate apportionment formula of the Republican State Convention.

Respondents filed their original complaint on December 1, 1972, in the United States District Court

for the District of Delaware alleging deprivation of equal voting rights under Title 42, Section 1983 of the U.S. Code. The complaint sought both declaratory and injunctive relief under 28 U.S.C. 2201 and 2202 and specifically an Order compelling the Delaware Republican State Committee to allocate delegates to the Republican State and National Conventions in a manner conforming to the principle of "one man, one vote." The District Court accepted jurisdiction under 28 U.S.C. 1343(3) and 1343(4) and the case was ultimately decided upon plaintiffs' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The complaint challenged the Constitutional validity of Rule 2 of the Republican State Committee. (The text of Rule 2 is set forth at Appendix B hereto.) Rule 2 provided for an allocation of 220 State Convention delegates in the following manner: 1) 120 delegates (54.5% of the total delegation) were allocated on the basis of 30 delegates to each of the four state convention districts and 2) the remaining 100 delegates (45.5% of the total delegation) were allocated on the basis of the percentage of the statewide Republican vote cast in certain specified prior elections.

Applicable Delaware statutes provide that candidates for particular state offices receiving more than 50% of the eligible delegate final polled vote would be certified to state election officials as the party candidate in the next general election. 15 Delaware Code §§3301, 3116. Other statutes provided that any candidate receiving 35% of the convention delegate final polled vote could be a candidate to run against the majority candidate in a direct party primary election, providing timely notice was given to the state election officials. 15 Delaware Code §§3116, 3107(a)(1).

Respondents also challenged the allocation formula by which the Delaware delegates and alternates to the Republican National Convention were selected. Historically, these delegates were allocated to the four state convention districts on the basis of three delegates and three alternates per district.

Respondents alleged a violation of the Equal Protection Clause of the Fourteenth Amendment as as the basis for relief. Respondents asserted that this voting strength had been unconstitutionally diluted in that their representation at the Republican State Convention and in the delegation to the Republican National Convention was not proportionate to the population, number of registered Republican or past Republican electoral strength in the second convention district.

The District Court granted plaintiffs' motion for summary judgment, finding that the existing delegate allocation formula (Rule 2) was violative of the Fourteenth Amendment's guarantee of equal protection. The District Court enjoined the Republican State Committee from engaging in its practice of allocating a portion of state convention delegates on the basis of equal number of delegates to each convention district and from the traditional practice of allocating Republican National Convention delegates on the convention district basis. The Court ordered the Delaware State Republican Committee to adopt a delegate allocation formula for the state convention, consistent with the "one man, one vote" principle and a similar order was directed to individual district committees. 362 F.Supp. 74-75.

An appeal was taken to the United States Court of Appeals, Third Circuit. A three-judge panel of the Court

of Appeals reversed the District Court's judgment and remanded for further proceedings. 502 F.2d 1123 (1974). The three judges filed separate opinions: an "Opinion of the Court" filed by Judge Gibbons, a concurring opinion filed by Judge Aldisert and a dissenting opinion filed by Judge Rosenn.

The "Opinion of the Court" first addressed itself to "The Effect of the District Court Order" (502 F.2d 1127-1128). Judge Gibbons held that in choosing to rule on the Delaware State Republican Party's own Rule, instead of the state statutes which give the rule the defacto force of state law, that the District Court may have unnecessarily intruded upon the state party's First Amendment right of association:

> "But the court's decision to let stand the challenged statutes but hold invalid the internal party rules raises quite serious first amendment issues . . . Many believe that party success in achieving statewide or national political power is intimately related to success in achieving such power in the local substructures of government. Thus the ability of any party in Delaware to organize itself on a district rather than an at large basis may be, or is believed to be, significantly related to its pursuit of the power to impose its policies upon government. The freedom to associate for such a pursuit is the heart of the right of association guaranteed by the first amendment." (502 F.2d 1127)

The opinion concluded:

> "The statute under which the state intrudes its action into the party continues to operate, but at the expense of the freedom of association of the party." (502 F.2d at 1128)

Judge Gibbons, speaking for the Court, reversed and remanded "... because the district court ... *did not weigh the highly relevant associational rights of the party.*" (502 F.2d 1123 at 1128) (emphasis added). Thus, the Court of Appeals clearly recognized and clearly instructed the District Court to recognize and weigh the First Amendment rights of the Delaware Republican Party.

The Court of Appeals also reversed and remanded because of the "three-judge court issue." Holding that the District Court had in effect improperly granted injunctive relief without convening a three judge court. Judge Gibbons instructed that on remand a three-judge court be convened if the plaintiffs continued their request for injunctive relief. The issue was subsequently mooted on remand as plaintiffs withdrew their request for injunctive relief. The short concurring opinion of Judge Aldisert contains no language indicative of any differences on the First Amendment issue between Judge Aldisert and the Opinion of the Court. Rather, Judge Aldisert articulates certain points of differentiation concerning the three-judge court issue. It is clear, therefore, that a majority of the division of the Court of Appeals was concerned with the failure of the District Court to consider petitioner's (defendants) First Amendment rights.

On remand, the District Court virtually ignored the clear intent of the Court of Appeals: consideration and weighing of the First Amendment rights of petitioners with respect to the Fourteenth Amendment claims of respondents (plaintiffs). 393 F.Supp. 372 (1975). Instead, the Court somehow concluded that it "... may not be bound to consider the issue raised by Judge Gibbons ..." (393 F.Supp. at 375), and thereafter considered the alternative to declaring Rule 2 unconstitutional. The District Court undertook a lengthy

recitation of Delaware state political and statutory history seeking to demonstrate that by declaring the ballot access statutes unconstitutional, no direct party primary would result. (393 F.Supp. 375-379) The District Court was apparently of the erroneous belief that the Court of Appeals' directive related only to possible questions of creating a direct Republican Party primary by holding state statutes unconstitutional. Such a ruling, the District Court correctly concluded, would not change the allocation of delegates to state party and national party conventions. Having thus partially ruled on the merits of the case, the Court thereupon reinstated its prior judgment.

The District Court's second judgment in this case suffers from precisely the same defects as the first: the Court did not weigh or consider the First Amendment association rights of the petitioners. The Court either ignored or fundamentally misinterpreted the opinion of the Court of Appeals, as Judge Gibbons clearly directed the District Court to consider and weigh various alternatives to sacrificing the First Amendment rights of the party. (502 F.2d 1128) Yet, the District Court considered only whether declaring state statutes unconstitutional would create a direct party primary. Nowhere does the District Court evidence any consideration or concern for the party's right to organize itself, to set its own goals, or to make political judgments on issues effecting elections and organizational strategy. In short, the question of the party's First Amendment rights was entirely ignored by the District Court.

Appeal from this second judgment was again taken to the Court of Appeals for the Third Circuit. Thereafter, a second panel of that Court, comprised of Judge Aldisert and two different judges, entered a Judgment

Order, without opinion, affirming the judgment of the District Court. This affirmance of the District Court's opinion, without even the minimal clarification of an opinion, establishes a ruling in this case that is inconsistent with a prior ruling of another panel of the Circuit in the same case. The resulting contradictions can serve only to obscure and cloud the issues present in this litigation.

The second panel opinion, does precisely what the Opinion of the Court in the first panel found so objectionable: it evidences no consideration whatsoever for the First Amendment association rights of the petitioners. The second appellate judgment denies to petitioners any opportunity for a full adjudication consonant with recent changes in the law on such vital issues as jurisdiction, standing, justiciability, state action, the rationality of the state convention formula, as well as the Delaware Republican Party's vital rights of association guaranteed by the First Amendment. Those errors may now only be cured by a granting of a writ of certiorari by this Court.

REASONS FOR ALLOWANCE OF WRIT

I.

A SIGNIFICANT CONFLICT EXISTS AMONG THE FEDERAL CIRCUITS ON THE ISSUE OF WHETHER PARTY NOMINATING CONVENTIONS SHOULD BE SUBJECT TO THE ONE MAN-ONE VOTE PRINCIPLE.

A review of case law since 1962 reveals a significant divergence among the Federal Courts on the issue of

the applicability of the one man-one vote principle to political party nominating conventions. As set forth in capsule form herein, there is simply no consensus among the circuits concerning this issue. The Third Circuit's Judgment Order, from which this appeal is taken, further confuses the state of the law on this issue, and certiorari should therefore be granted in order to finally resolve this important, and frequently reoccurring, issue.

In *Gray v. Sanders*, 372 U.S. 368 (1965), this Court expressly reserved the issue of whether the Equal Protection Clause of the Fourteenth Amendment requires that party nominating conventions conform to the one man-one vote principle.* Since that holding the federal courts have been unable to agree on this issue.

In *Irish v. Democratic-Farmer-Labor Party of Minnesota*, 399 F.2d 119 (8th Cir. 1968), *aff'g* 287 F. Supp. 794 (D. Minn. 1968), the Eighth Circuit held the one man-one vote requirement inapplicable to a state party convention which selected delegates to the national convention. Similarly, in *Smith v. State Executive Committee*, 288 F. Supp. 371 (N.D. Ga. 1968), a federal district court denied relief in a case filed against the Democratic State Executive Committee. Party members had alleged deprivation of equal protection in the selection of delegates to the national convention. The Court could find no precedent for judicial intervention in "the internal rules or management of a political party." *Id.* at 376. Most recently, the United States Court of Appeals for the District of Columbia

*372 U.S. at 378 n. 10; *see also Cousins v. Wigoda*, 419 U.S. at 483-84 n. 4 (1975).

held *en banc* that the Equal Protection Clause does not require the application of one man-one vote to the allocation of delegates to national political conventions. *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (1975), *cert. denied* ____ U.S. ____ (1976). The Court found that Fourteenth Amendment requirements are satisfied,

> ". . . if the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." (*Id.* at 586-587.)

To the contrary, a line of cases originating with *Maxey v. Washington State Democratic Committee*, 319 F. Supp. 673 (W.D. Wash. 1970), has held that the one man-one vote requirement applies to party nominating conventions.

In *Maxey* the District Court extended the one man-one vote standard established as to primary elections in *Gray v. Sanders, supra*, to the state party conventions, notwithstanding the Court's specific reservation of the issue in *Gray*. Indeed, the *Maxey* Court evidenced cognizance of the inconsistency its holding would create by finding itself compelled to explain away the holdings in *Irish* and *Smith*:

> "I agree that the one-man-one-vote principle must be applied at the precinct level, but insofar as *Irish* and *Smith* hold that this is the only level to which it applies I think those cases are inconsistent with the principles announced in *Reynolds* [v. Sims, 377 U.S. 533 (1964] and *Gray*." (319 F. Supp. at 680)

Maxey was followed in *Doty v. Montana State Democratic Central Committee*, 333 F. Supp. 49 (D. Mont. 1971), where one man-one vote was applied to a county committee that chose delegates to the national

convention and filled vacancies in the party's slate of candidates occuring between primary and general elections. Similarly, the Court of Appeals for the Second Circuit required a Republican Party Committee to conform to one man-one vote standards when it nominated candidates for local offices. *Seergy v. Kings County Republican County Committee*, 459 F.2d 308 (2nd Cir. 1972). In *Barthelmes v. Morris*, 342 F. Supp. 153 (D. Md. 1972), plaintiffs attacked an allocation of delegates to the national convention that distributed delegates equally by congressional districts. Their claim was that equal protection was denied them because the apportionment formula was based on population alone and not party strength. The Court, although dismissing the complaint for laches, noted that the cases, "differ in the applicable standards which must govern delegate selection processes. . . .," *Id.* at 158. The Court noted further that a substantial constitutional issue had been raised.

Thus, federal courts in the Eighth (*Irish v. Democratic-Farmer-Labor Party of Minnesota, supra*), Fifth (*Smith v. State Executive Committee, supra*), and District of Columbia (*Ripon Society, Inc. v. Republican National Committee, supra*) Circuits hold that the one man-one vote principle does not apply to party nominating conventions, while federal courts in the Ninth (*Maxey v. Washington State Democratic Committee, supra; Doty v. Montana State Democratic Central Committee, supra*) and Second (*Seergy v. Kings County Republican County, Committee, supra*) Circuits hold to the contrary. These cases indicate a clear and significant split of opinion within the meaning of U.S. Supreme Court Rule 19. Certiorari should therefore be granted to resolve this important question of federal law.

II.

THE DECISIONS BELOW FAILED TO RECOGNIZE THE FIRST AMENDMENT TO THE CONSTITUTION'S GUARANTEED FREEDOM OF ASSOCIATION TO POLITICAL PARTIES.

The delegate apportionment formula to be employed at the Delaware Republican State Convention was established by the Delaware Republican Party, seeking to achieve Delaware Republican objectives. The Supreme Court has frequently recognized the kinship of the freedoms of speech and of political association. See, e.g., *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This Court has declared that "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

The right of individuals to associate is protected by the First Amendment to the Constitution from interference by any branch of government, including the judicial branch. See *NAACP v. Button*, 371 U.S. 415 (1963); *Sweezy v. New Hampshire, supra*. Freedom to associate is a freedom to meet with others of one's choosing, to organize and to engage in political activity. The freedom to engage in political activity has often been cited as that goal which all other constitutionally guaranteed liberties seek to preserve. *Hadnott v. Amos*, 394 U.S. 358 (1969); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *NAACP v. Alabama, ex rel. Patterson, supra;* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965).

The Supreme Court has recognized that to make the right of political association meaningful, the First Amendment must necessarily protect the activities of political parties from interference. Political parties are the common vehicle of political activity in this country and their ability to operate independently of governmental intrusion results in the successful operation of the American political system. *NAACP v. Button*, 371 U.S. 415 (1963), *Rosario v. Rockefeller*, 458 F.2d 649 *Rosario v. Rockefeller*, 458 F.2d 649 (2nd Cir. 1972).

Political decisions are generally made on the basis of that which seems best calculated to strengthen the political party and to advance its interests. That process, itself, deserves the protection of the Federal Constitution, as much as, if not more than, the concomitant rights of speech and assembly. The guaranteed freedom of speech and assembly becomes mute and nonexistent if they do not include with them the right to effect change through political process.

The Third Circuit Court of Appeals in this case, 502 F.2d 1123 (1974), recognized this principle when it reversed the District Court's decree on the basis that the decree unduly interfered with the party's right of free association, The Court stated:

> "If a given party chooses to organize by districts, *but to allocate delegate strength to a district in which it has fewer numbers but a greater opportunity to achieve the practical advancement of the political ideas for the pursuit of which the association was formed*, state action which frustrates that choice is highly suspect."
> (502 F.2d at 1127-28) (emphasis supplied)

The implications of this reasoning are clear. No court can, consistent with the right of free association guaranteed by the First and Fourteenth Amendments, interfere with politically-oriented determinations of

political strength to different segments of the electorate.

Although an ancient maxim prescribes that "for every wrong the law prescribes a remedy", petitioners herein were denied their mandated remedy by the District Court upon remand. As is set out in the Statement of the Case, the District Court, on remand, ignored the Court of Appeals' instructions and, compounding that error, a new panel of the Court of Appeals affirmed the District Court's nonaction, thereby leaving the state of the law on this question in the Third Circuit in a confused and inexplainable state. The confusion, simply stated, was that two separate panels on the Third Circuit Court of Appeals ruled differently from one another in the same case on the same issues. Legal confusion on the issues presented in this case, as was shown earlier in this petition, is not exclusively restricted to the Third Circuit, but rather is national in scope. A circumstance that only a grant of certiorari and a definitive opinion of the Supreme Court can cure.

In *Ripon Society, Inc., et al v. National Republican Party and Republican National Committee, supra*, an en banc panel of the U.S. Court of Appeals of the District of Columbia Circuit directed themselves to the question of the First Amendment's application to a gathering of individuals at a national political convention. Petitioners are unable to elucidate a justifiable rationale which distinguishes the First Amendment's guaranteed right of association on a national basis to that of a state basis. The Ripon court commented succinctly on this issue stating:

> "It is urged that this convention delegate apportionment formula represents nothing more than an effort by party members from strongly

> Republican states to perpetuate their control. But it seems to us that the First Amendment protects their power to do precisely that. The Party could have chosen a delegate allocation scheme calculated to broaden its base, by giving special influence to delegates from States where the party is weak. Instead it appears to have chosen to consolidate its gains in states where it has been strong. We are not about to hold that this is an irrational way to seek political success." (525 F.2d at 588)

Concluding its discussion of the First Amendment, the en banc panel of the D.C. Circuit in *Ripon* stated:

> "To the extent that voting rights are offset by the First Amendment rights exercised by the Party in choosing the formula it did. We must emphasize that this is only true because the formula rationally advances legitimate party interests in political effectiveness. The same might not always hold true. There are no racial or other invidious classifications here." (Id.)

Respondents herein have never maintained below nor is any evidence available to support an argument that the Delaware Republican convention formula contains racial or other invidious classifications. Given that consideration, one is justified in questioning why the First Amendment to the Federal Constitution appears to have one meaning in Washington, D.C. (and elsewhere) and an opposite meaning in the Third Circuit. The same argument unsuccessfully advanced by the Ripon Society in the Ripon case was rejected by the D.C. Circuit, yet erroneously adopted by the District Court on remand in this case . . . and still later, accepted by a second panel of the Third Circuit Court of Appeals.

III.

INTERNAL POLITICAL PARTY DELIBERATIONS AND CONCLUSIONS CALCULATED TO SERVE PARTY INTERESTS CONSTITUTE LEGALLY NON-JUSTICIABLE CONTROVERSIES.

On remand, the District Court should have applied the traditional principle of judicial non-interference in political party affairs and should have refused to adjudicate the alleged malapportionment of delegates to the Delaware Republican State Convention. Respondents assert that justiciability of the subject matter of this litigation on the basis of the decision held in *Baker v. Carr*, 369 U.S. 186 (1962) and the subsequent reapportionment cases. The *Baker* landmark decision stresses the "need for a case by case inquiry" into each subsequent litigation for a determination of justiciability. *Baker* does not pronounce justiciability for all political questions. Indeed, since 1962, the recent trend by Federal Courts has been to restrict rather than broaden the *Baker* principle.

In *Baker*, the Court found that the one man-one vote principle, as part of the "well developed and familiar" standards under the Equal Protection Clause of the Fourteenth Amendment, provided a judicially discoverable standard for determining whether a popularly elected state legislature was properly apportioned. But, as the D.C. Court of Appeals recognized in *Georgia v. National Democratic Party*, 447 F.2d 1271 (1971) cert. den. 404 U.S. 858 (1971), a population-based, one man-one vote principle is an "inappropriate test of representation in the framework of national politics where parties compete for membership." (447 F.2d at

1278-79). On the basis of this analysis, the D.C. Circuit rejected a complaint that delegates to the national party conventions were not allocated among the states according to population.

The earlier Court of Appeals decision in this case recognized the legitimacy of political party deliberations for party interests as a purely political function. The decision of what formula to best employ in allocating delegates to a party's state convention involves questions of how best, "to achieve the practical advancement of the political ideas for the pursuit of which the (party) was formed." *Redfearn v. Delaware Republican State Committee*, 502 F.2d 1123, 1127-28 (3d Cir. 1974). Resolution of these internal party matters are best reserved to the parties themselves.

Federal Courts have consistently refused to rule upon cases involving the internal political controversies of political parties. Commencing with Chief Justice Marshall's landmark opinion in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), and continuing to *O'Brien v. Brown, Keane v. National Democratic Party*, 409 U.S. 1 (1972), and the Supreme Court's denial of certiorari in *Ripon Society v. Republican National Committee, supra*, in 1976, the Judicial Branch of the Federal Government has traditionally avoided political controversies.

In its opinion in *O'Brien* and *Keane*, the Supreme Court commented upon the "absence of authority supporting the action of the Court of Appeals in intervening in the internal determinations of a political party . . ." The Court recognized the importance of this doctrine and noted:

> ". . . No case is cited to us in which any Federal Court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of the Court up to now gives support for judicial intervention in the circumstances . . . involving as they do relationships of great delicacy and *essentially political in nature*." 409 U.S. at 4. (emphasis added)

The *O'Brien* case, while not directly contesting the full delegate selection formula of the entire convention, focuses on the delegate allotment of two of the fifty states. However, the relief sought by the *O'Brien* plaintiffs was couched in Equal Protection claims (as is respondents herein) and they alleged a dilution of voting rights (as do respondents herein) and the case resulted from a refusal of a majority of the delegates present at the convention to adopt the position of the moving litigants (as was the case with the Respondents herein). Faced with the necessity of ruling, lest the 1972 Democratic National Convention be enjoined and unable to nominate a candidate, the Supreme Court upheld the jurisdiction and justiciability questions, but resolved the merits by letting the convention itself decide its own internal party questions. Until the Supreme Court's decision in *Cousins v. Wigoda*, 419 U.S. 477 (1975) and its denial of certiorari in *Ripon, supra*, the *O'Brien* decision was the most recent Supreme Court ruling in this area. It upheld the tradition of judicial restraint on ruling upon political matters and specifically, where political party convention decision-making questions are raised. *O'Brien* is most relevant to this case.

While *O'Brien, Wigoda* and *Ripon* all involve the application of justiciability to a national party's political convention, no rational distinction exists in the law to apply a different standard of justiciability to a state party's political convention. Both constitute a

voluntary association of individuals for a stated political purpose of formulating political decisions and strategies calculated to advance political goals and objectives. Unlike *Baker*, any alleged malapportionment resulting from that voluntary association does not produce unequal representation of elected state officials to their individual constituencies.

The *Baker* reasoning, while sound as applied to the election process of state officials, is wanting when attempted to be analogized to voluntary gatherings of individuals for political purpose, whether or not that voluntary association is national or local in scope. The one man-one vote standard was found to be inapplicable in *Irish v. Democratic-Farmer-Lobor Party of Minnesota*, 399 F.2d 119 (8th Cir.), which held that a state party may select national convention delegates through a malapportioned state convention system. *Smith v. State Executive Committee*, 288 F.Supp. 371 (N.D. Ga. 1968) holds similarly to *Irish*. The third Circuit, in 1965, seemingly applied a different rule of reason to the issue of justiciability in questions of this type, *Lynch v. Torquato*, 343 F.2d 370 (3d Cir. 1965), ruling that the one man-one vote standard was inapplicable to selection of a state party's county committee. These and other cases speak to the recognition of judicial restraint in litigation involving internal party questions.

Petitioners reassert that the deliberations and conclusions reached by the Delaware Republican State Committee determining the delegate apportionment formula for the Delaware Republican State Convention constitute internal political deliberations by individuals voluntarily associating themselves into the political process. That undertaking by those individuals does not

differ in form or in substance from that undertaking of the individuals in *O'Brien, Ripon, Irish, Smith* or *Lynch*. Judicial restraint is exercised in those matters and should likewise have been applied in this case.

In 1975 the Supreme Court addressed issues related to this case in the case of *Cousins v. Wigoda, supra*. At the close of its opinion in *Cousins*, 95 S. Ct. at 549, the Court quoted from its earlier decision in *O'Brien* (409 U.S. at 4) in saying that, "the convention itself (was) the proper form for determining intra-party disputes as to which delegates (should) be seated." It is clear, of course, that the present case does not involve a national political convention nor a delegate seating contest. However, *Cousins* stands as a very strong decision committing basic decision-making authority about the make up of a political convention to the political party hosting the convention. The opinion relies heavily upon freedom of association of individuals in the political-decision making process. *Cousins* lends support to many aspects of Petitioner's position in this case: that convention delegate decisions are political decisions, made by party people in the exercise of freedom of association; that such decisions are self-policing and self-conforming to the rule of reason and rationality by virtue of the political process itself. That process requires, if it is to be successful, broad appeal and responsiveness. Without success, a political party will not survive.

It may be that the *Cousins* decision indicates the Court's view that if the political convention system is to remain effective—and it has been a rather good system which has evolved, and no one has clearly shown that there is a better system for our conditions—the Court must continue to grant wide

powers to the Convention itself in providing for the selection of delegates. If it does not do so, it will exacerbate the risk that intra-party factional disputes will develop, and these will often be presented to courts at the last minute with considerable potential for disruptive effect on the whole system, and, indeed with greater adverse effect on public confidence in the system than is warranted by the substance of the particular detailed questions which are raised.

When the Supreme Court of the United States denied the Ripon Society's writ of certiorari in *Ripon v. RNC, supra,* resulting from an adverse decision against the Ripon Society, rendered by an en banc panel of the U.S. Court of Appeals for the District of Columbia Circuit exercising judicial restraint, the Supreme Court reinforced the logic inherent in recognition of non-justiciability issues.

The opinion of the first panel of the Third Circuit Court of Appeals in this case 502 F.2d 1123 (1974) recognizes the overlapping problems of this litigation in the First Amendment and justiciability. The panel's instructions to the District Court on remand were not carried out and, as indicated earlier, the second panel of the Third Circuit Court of Appeals failed to recognize that error. Only through granting of this writ may these petitioners be assured that these relevant, and indeed controlling, issues associated with this litigation will be judicially determined.

CONCLUSION

The decision below conflicts with a prior decision of the same appellate court in this case, and leaves the law on convention delegate apportionment in confusion

within the circuit and in apparent conflict with recent decisions in other circuits. The decision below ignores the First Amendment rights of petitioners.

For the reasons stated above, petitioners respectfully request that the Court grant this Opinion for *certiorari.*

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

– – –

No. 75-1588

– – –

B. WILSON REDFEARN, et al.

v.

DELAWARE REPUBLICAN STATE
COMMITTEE, et al.,
Defendants

BASIL R. BATTAGLIA, et al.,
Intervening Defendants,

DELAWARE REPUBLICAN STATE
COMMITTEE, et al.
Defendants and Intervening
Defendants,

Appellants.

– – –

Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 4528)

– – –

Submitted Under Third Circuit Rule 12(6)
November 14, 1975
Before: ALDISERT, HUNTER and GARTH,
Circuit Judges.

– – –

JUDGMENT ORDER

After considering the contentions presented by the appellants, (1) that the majority of the court when these proceedings were previously before us at 502 F.2d 1123 did find that the district court's decision intruded upon the appellants' First Amendment right of association and there were viable alternatives to such decision and (2) that the district court on reversal and remand may not substitute its own interpretation of a statutory scheme for that given by this court,

And the courthaving concluded that the majority members of the court at 502 F.2d 1123 agreed only that a challenge to the internal rules of the Republican State Committee of Delaware for the allocation of delegate seats in that party's state convention which challenge requested injunctive relief thereby requiring the convening of a three-judge court, and this court recognizing that neither Judge Gibbons nor Judge Aldisert reached the merits of the controversy, it is

ADJUDGED AND ORDERED that the judgment of the district court be and the same is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

/s/ Ruggero J. Aldisert
Circuit Judge

Attest:

/s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: NOV 14 1975

APPENDIX B

Delaware Republican State Committee, et al.

Rule 2

The State shall be divided into four (4) Convention Districts as follows: The City of Wilmington shall be known as the First Convention District: New Castle County, outside of the City of Wilmington, shall be known as the Second Convention District; Kent County shall be known as the Third Convention District; and Sussex County shall be known as the Fourth Convention District. The Republican State Convention shall consist of two hundred and twenty (220) delegates, with fifty-five (55) percent of the delegates being distributed equally among the four (4) Convention Districts and forty-five (45) percent on the basis of Republican vote. The distribution shall be made in the following manner: one hundred and twenty (120) delegates shall be distributed on the basis of thirty (30) delegates to each Convention District; one hundred (100) delegates shall be distributed among the Convention Districts on the basis of one (1) delegate for each one (1) percent of the Statewide Republican vote which was cast in each Convention District in the last Presidential election. The Republican vote shall be determined by averaging the vote for the Republican Candidates for State Treasurer and for State Auditor. The State Committee, at its first meeting following each Presidential election, shall fix the number of delegates for each Convention District pursuant to the formula set forth above.

Supreme Court, U. S.
FILED
APR 20 1976
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1462

DELAWARE REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

B. WILSON REDFEARN, *et al.*,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTORY NOTE

This supplemental appendix contains the second opinion of the United States District Court for the District of Delaware in this litigation. This decision is reported at 393 F.Supp. 372 (1975).

B. Wilson REDFEARN et al.,
Plaintiffs,
v.
DELAWARE REPUBLICAN STATE COMMITTEE and Herman C. Brown, Chairman, Defendants,
Basil R. Battaglia et al., Intervening Defendants,
James H. Baxter, Jr., et al., Intervening Defendants,
Charles G. Lamb et al., Intervening Defendants.
Civ. A. No. 4528.

United States District Court
D. Delaware.
April 2, 1975.

OPINION

LATCHUM, Chief Judge.

In prior proceedings of this case, this Court granted plaintiffs' motion for summary judgment, declaring: (1) that the State Convention delegate allocation formula set forth in Rule 2 of the Republican State Committee and (2) the Republican State Committee's traditional practice of allocating Delaware's delegates and alternate delegates to the Republican National Convention equally among the existing four Republican Convention Districts violated plaintiffs' rights under the equal protection clause of the Fourteenth Amendment. The Court also enjoined the future use of those formulae and directed the Republican State Committee to devise

new formulae for the allocation of delegates to the state nominating convention and the allocation of delegates to the national nominating convention consistent with the one-man, one-vote principle. Redfearn v. Delaware Republican State Committee, 362 F.Supp. 65 (D.Del.1973). Upon appeal, a division of the Third Circuit Court of Appeals, composed of Judges Aldisert, Gibbons and Rosenn, reversed and remanded. Redfearn v. Delaware Republican State Committee, 502 F.2d 1123 (C.A. 3, 1974). The Third Circuit Judgment received on October 1, 1974 in lieu of a formal mandate provided in relevant part that this Court's judgment of August 2[illegible] 1973 "... is hereby reversed and the cause remanded ... for further proceedings consistent with the opinion of this Court." (Docket Item 37).

[1] Since further proceedings in this court must strictly conform to the Court of Appeals' mandate as to matters within its compass, Briggs v. Pennsylvania R. Co., 334 U.S. 304, 306, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948); Holliday v. Pacific Atlantic S. S. Co., 117 F.Supp. 729, 732 (D.Del.1953), it is incumbent upon this Court to determine what the Court of Appeals' "opinion" decided in order to ascertain what issues this Court is bound to consider and what action it is required to take.

Each of the three judges of the division wrote separate opinions. A close study of those opinions reveals that there was only one point of law upon which a majority of the division (Aldisert, J. and Gibbons, J.)[1] agreed. Judges Aldisert and Gibbons concurred for different reasons that a reversal was

[1] Judge Rosenn dissented.

necessary because a three-judge district court was required under 28 U.S.C. § 2281[2] "as long as plaintiffs insist on injunctive relief." 502 F.2d at 1129.

Judge Gibbons reasoned that "although the order appealed from was in form an injunction against the operation of the party's internal rules, those rules implicated state action only by virtue of 15 Del.C. §§ 101, 3301(c) and 3116,[3] and the injunction is against those statutes as applied to the Republican State Committee." 502 F.2d at 1125. Thus, Judge Gibbons concluded that, since the Court's injunction was in effect issued against the "enforcement, operation or execution of State statutes," it was by virtue of 28 U.S.C. § 2281, beyond the power of a single-judge district court to issue. 502 F.2d at 1128-29.

On the other hand, Judge Aldisert was of the opinion that a three-judge district court was required under § 2281 because the injunction ran against a statewide rule of the Republican Party which was so inexorably intertwined with the state election process that the rule had to be considered an administrative regulation of

[2] 28 U.S.C. § 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

[3] The Code and section references referred to Delaware Code Annotations, 1953.

statewide operation within the meaning of 28 U.S.C. § 2281. 502 F.2d at 1129.

Hence it is quite clear that the majority of the court agreed, albeit for different reasons, that this Court's judgment of August 20, 1973 should be reversed because the injunctive relief granted was beyond the power of a single district judge. The majority also agreed that if the plaintiffs upon remand should withdraw their prayer for an injunction leaving only their request for declaratory relief, the case could properly proceed before a single judge. 502 F.2d at 1129. Following remand the plaintiffs withdrew their demand for injunctive relief. (Docket Item 38).

[2, 3] There is no question that had the plaintiffs persisted in their demand for injunctive relief, strict compliance with the mandate would have required this Court to request the convening of a three-judge district court pursuant to 28 U.S.C. § 2284. But since the plaintiffs no longer seek injunctive relief, the necessity for convening a three-judge district court disappears and all this Court need do under the mandate is to revise its August 20 judgment to eliminate its injunctive provisions. This is so because it is necessary for a majority of the Appeals Court to agree before a principle can become "law of the case" binding upon the lower court. Rule 2(5) U.S. Court of Appeals For Third Circuit; 28 U.S.C. § 46(d); see 1B Moore's Fed.Prac. ¶ 0.404[10], n.1.

[4] One other issue was discussed by the Court of Appeals which confronts this Court with a rather unique situation. Judge Gibbons would require this Court on remand to consider declaratory relief against the continued operation of 15 Del.C. 1953 ed. § 3301(c) [now 15 Del.C., Rev.1974, § 3301(e)][4] and

[4] Since the former opinions in this case, the Delaware Code has been issued in a Revised 1974 edition.

§ 3116 [now 15 Del.C., Rev.1974, § 3113] as an alternative to declaring Rule 2 of the Republican Party unconstitutional. 502 F.2d at 1128. Judge Rosenn disagreed with Judge Gibbons' approach to this issue for a number of reasons and took the position that this Court should not be required to consider the constitutionality of any state election statute. 502 F.2d at 1131-1133. Judge Aldisert gave no indication at all of his position on that question. 502 F.2d at 1129. Accordingly, since only one member of the division would now require consideration of the additional issue raised by Judge Gibbons, it appears that nothing need be done by this Court under the mandate of the Court of Appeals other than to merely re-enter the declaratory and non-injunctive portions of its August 20, 1973 judgment.

Nevertheless, while this Court may not be bound to consider the issue raised by Judge Gibbons since it was not a matter upon which a majority of the division agreed and consequently was not within the compass of the mandate, this Court appears to be free to consider that issue as a matter of discretion. See, e.g., Sprague v. Ticonic National Bank, 307 U.S. 161, 168, 59 S.Ct. 777, 83 L.Ed. 1184 (1939).

Because this Court possibly may have misinterpreted Judge Aldisert's silence with respect to the issue discussed by Judge Gibbons and in order to avoid further delay in the final disposition of this case and to conserve judicial effort, this Court concludes that it should consider Judge Gibbons' alternative to declaring Rule 2 unconstitutional and it now turns to that question.

In addition to the very pertinent reasons advanced by Judge Rosenn, this Court after due consideration finds

and concludes that Judge Gibbons' alternative of declaring 15 Del.C., Rev.1974, § 3301(e) and § 3113[5] unconstitutional would be neither feasible nor effective for the following reasons:

1. As I understand Judge Gibbons' opinion, he would remand the case to this court with directions to consider the constitutionality of 15 Del.C., Rev.1974, § § 3301(e) and 3113 because he was of the opinion that the denial of equal voting strength in the primary election held for delegates to the Republican state nominating convention arose from a combination of (1) Rule 2 of the Republican Party which provides for the equal allocation of convention delegates to districts which are unequal in population and (2) the state statute (§ 3113) that limits candidates for statewide and national office from participating in a run-off direct primary election to those who received at least 35% of the delegate vote cast at the party's state nominating convention. While Judge Gibbons recognized that the inequality of voting strength could be remedied by invalidating the party rule and requiring nominating convention delegates to be apportioned in accordance with the one-man, one-vote principle as this Court had previously ordered, he believed that an alternative and better approach would be for this Court to allow the party rule to stand but to declare unconstitutional 15 Del.C., Rev.1974, § § 3113 and 3301(e), the Delaware statutes that limit a run-off direct primary election for statewide and national offices to those candidates who receive at least 35% of the vote at the state nominating convention. Judge Gibbons was of the opinion that

---

[5] The reference to the code provisions referred to by Judge Gibbons will be to the Del.Code, 1974 Revised Edition.

declaring these two state statutes invalid, while leaving unaffected the party rule which malapportioned the delegates to the state nominating convention, would afford greater protection to the Republican Party's associational rights guaranteed by the First Amendment.

Judge Gibbons' approach was based on his belief that declaring §§ 3113 and 3301(e) unconstitutional would have the effect of creating a direct primary for all statewide and national candidates that would be open to all Republican Party members despite the action that might have been taken by the state nominating convention, and thus, because the ultimate party nominee for the statewide or national office would be selected at an at-large direct primary election on a one-man, one-vote basis, no denial of equal voting rights would occur. In this connection Judge Gibbons wrote:

> "Prior to 1969 the method of becoming a party candidate was both simple, and from the point of view of state involvement, neutral.
>
> 'Any person desiring to be voted for as a candidate for nomination at any primary election shall notify the County Committee of which he is a member, in writing at least 15 days before such primary election is held.' 15 Del.C. § 3107 (amended by 57 Del.Laws ch. 241 § 5; 57 Del.Laws ch. 567 § 18C). [New 15 Del.C.Rev.1974 § 3106.]
>
> * * * * * *
>
> "But because prior to 1969 mere notice of intention to become a candidate sufficed for a candidate to obtain a place on the primary ballot, the internal party organization had no legal though perhaps a significant practical effect on the ultimate party nominee. Thus prior to 1969 there was no legally significant tension between a Delaware political party's right to determine its own makeup and the one man, one vote principle.

In 1969, however, the legislature (one may presume at the invitation of the major parties) intruded into the internal affairs of political parties in a significant way by amending 15 Del.C. § 3107 [now 15 Del.C., Rev.1974, § 3106] with respect to the manner of becoming a primary election candidate for statewide office, and by the addition of 15 Del.C. §§ 3116 [now § 3113] and 3301(c) [now § 3301(e)] imposing new legal obligations on political parties. Section 3301(c) [now § 3301(e)] provides that no candidate for the office of Elector of President and Vice President, United States Senator, Representative in Congress or State Officer elected statewide may be deemed nominated for the general election unless he has either received more than 50% of the eligible delegate vote at a party nominating convention or has received a majority of the votes cast in a party primary election. The section provides further:

> "No such state nominating convention shall have completed its business relative to such nominations until such time as 1 nominee for each of the aforesaid offices shall have received a vote greater than 50% of the total number of eligible delegate votes at such convention, which polled vote shall be considered final.'
>
> "There is no way to get on the general election ballot as a candidate for statewide office other than by a convention nomination or a primary election. By virtue of 15 Del.C. § 3116 [now § 3113] a primary election will be held only after one candidate at a party nominating convention receives 50% of the total number of eligible delegate votes, and only if one other candidate in the final polled vote at the convention receives at least 35% of the eligible delegate votes cast. The effect of these provisions is to restrict access to the general election ballot to no more than two

candidates from each political party which is large enough to be eligible to hold a primary election." [Words added].

The fallacy underlying Judge Gibbons' approach is that his legal theory is based upon the mistaken view that old 15 Del.C., 1953, § 3107 permitted anyone who desired to become a Republican Party candidate for a statewide or national office to obtain a direct primary election simply by giving notice to the County Committee of his desire to be on the ballot. This, however, has never been the law of Delaware nor the custom and practice of any political party in this State.

Historically under Delaware law, political parties have always had the choice between a direct primary and the convention system for nominating candidates for national, state, county, district and municipal offices. Merriam & Overacker, Primary Elections (1928) pp. 41-42, 58-59, 65, 93-94, 365; Vol. 1, Delaware, A History of the First State (Reed, ed., 1947), p. 342; Opinion of the Justices, 295 A.2d 718, 721 (Del.-Sup.1972). Direct primaries were first used in Delaware by political parties for municipal elections in Wilmington and the use of direct primaries spread during the last quarter of the 19th Century to New Castle County for the nomination of candidates for the general assembly and county offices. Vol. 1, Delaware, A History of the First State, *supra;* Merriam & Overcracker, supra at 27, 37. On May 27, 1897, an Act was passed, the forerunner to our present primary laws, to provide for the purity of primary elections in New Castle County. 20 Del.Laws, c. 393. The Act, based on the State's police power, simply provided voting safeguards and methods for conducting a political party primary election, whether it was an indirect primary for

the election of delegates to a city, county or state nominating convention which in turn selected the party candidates for public office or whether it was a direct primary for the election of candidates through direct voting by qualified party members. The Act did not attempt to dictate to political parties whether party nominations were to be made by convention delegates or by a direct primary. This option was left entirely within the discretion of the governing body of each political party. 20 Del.Laws, c. 393 § § 19 & 2; Merriam & Overacker, *supra* at 58-59, 65, 99-100; State ex rel. Willis v. Keenan, 181 A. 213, 216 (Del.Super.1935). The Act providing for the purity of primary elections, 20 Del.Laws c. 393, was not extended to apply to Kent and Sussex Counties until March 26, 1913. 27 Del.Laws, c. 66; Merriam & Overacker, *supra* at 63.

As time passed between the turn of the century and into the early 1930's, the county political parties in Kent and Sussex Counties also began to abandon the use of the county convention system for the nomination of candidates for the general assembly and county officers in favor of direct primaries for these local public offices. Vol. 1, Delaware, A History of the First State, p. 242.

On the other hand, *no state* political party in Delaware, including the Republican Party, has ever exercised the option of holding an initial direct primary election for the nomination of candidates for statewide offices,[6] national office,[7] Presidential and Vice Presi-

[6] The statewide offices are Governor, Lt. Governor, Attorney General, Insurance Commissioner, State Auditor and State Treasurer.

[7] The national offices are for Representative in Congress and United States Senator.

dential electors or delegates to a National Convention. Vol. 1, Delaware, A History of the First State, p. 343; Delaware Politics 1904-1954, Hastings; Rule 5.3, Rules of The Democratic Party of the State of Delaware; Rules 16,17(a), 18, 20(a) & 29(a), Rules of The Republican Party of the State of Delaware (Docket Item 7, Exhibit A).

It was not until 1969 that the legislature by the adoption of 15 Del.C., 1953, § 3116 [now 15 Del.Code, Rev.1974, § 3113] provided a "run-off" direct primary election to any statewide or national candidate who received 35% of the vote of the delegates cast at a state convention if that candidate demanded a statewide run-off primary between himself and the candidate who had received at least 50% of the delegates' votes at the convention.

[5] Consequently, it is clear that should this Court declare unconstitutional § 3116 [now § 3113] and § 3301(c) [now § 3301(e)], it would not have the effect that Judge Gibbons visualized of providing a direct primary for the nomination of statewide and national offices open to all Republican Party members who might wish to participate. This is so as discussed above because it is the governing body of the state political parties, and not prospective candidates, who decides whether party candidates will be nominated by the delegates to a state convention or by a direct primary election.

[6] Thus, when Judge Gibbons referred to 15 Del.C., 1953, § 3107 as it existed prior to 1969, and stated that it provided that mere notice of intending to become a candidate sufficed for a candidate to obtain a place on a primary ballot, he failed to realize that this was true only with respect to those direct primary

elections for the nomination of local offices which the parties themselves decided to hold. Thus, from a practical and realistic standpoint, § 3107 as it existed prior to 1969 only applied to direct primaries for the nomination of members of the general assembly, county and local offices. Indeed, this is reflected in the pre-1969 language of § 3107 itself. Notice of intent to become a candidate for the general assembly, county or other local office was required to be given to the County Committee and the amended section 15 Del.C., Rev. 1974, § 3106(c) makes explicit what in fact had been traditionally followed for years. Consequently, if this Court were to declare § 3116 [now § 3113] and § 3301(c) [now § 3301(e)] unconstitutional, it would not have the effect of establishing a direct primary election for the nomination of candidates for statewide and national offices open to all Republican Party members. The Republican Party would remain free as it has in the past to nominate such candidates at a state convention composed of delegates selected on a malapportioned basis which this Court previously found to be violative of the equal protection clause of the Fourteenth Amendment because of the apportionment of convention delegates ignored the one-man, one-vote principle.

2. This Court also previously concluded that the traditional and historical practice of allotting an equal number of Republican National Convention delegates to each of the four Convention Districts, whose population and registered Republican votes are disproportionate, was unconstitutional. Since § 3116 [now § 3113] and § 3301(c) [now § 3301(e)] do not provide for a run-off direct primary for such national delegates, declaring those two statutes invalid would have no impact

whatsoever on the existing and past method of selecting delegates to the Republican National Convention. Delegate malapportionment would remain.

3. Finally, even if §3116 [now §3113] were declared invalid, the run-off direct primary election would continue to be limited to the two candidates who received 50% and 35% of the delegate votes cast at the state nominating convention. This is so because Rule 20(b) of the Republican State Committee has implicitly preserved that right by internal rule independent of the statute. (Docket Item 7, Exhibit A, p. 5). Consequently, the run-off direct primary preserved by Rule 20(b), would not open that primary to all Republican Party members who might wish to be considered as party nominees for statewide or national offices. To accomplish Judge Gibbons' objective would require this Court to declare Rule 20(b) invalid which according to Judge Gibbons would seem to constitute an equally obnoxious intrusion into the associational rights of the Republican Party as the limited intrusion originally taken by this Court. However, even declaring Rule 20(b) invalid, if permissible, would not for the reasons set forth above be effective to create an open primary.

It is thus quite obvious that Judge Gibbons' alternative suggestion would not be meaningful or effective to rectify the constitutional violations faced by this Court.

The Court will therefore reinstate its previous judgment finding and declaring that the State Convention delegate allocation formula set forth in Rule 2 of the Republican State Committee and the traditional practice of allocating Republican National Convention delegates equally to each of the four Convention

Districts violate plaintiffs' rights under the equal protection clause of the Fourteenth Amendment as both practices violate the one-man, one-vote principle. Since injunctive relief is no longer sought, the reinstated judgment will eliminate the earlier provisions for injunctive relief.

Judgment will be entered in accordance with this opinion.

Supreme Court, U. S.
FILED
MAY 12 1976
MICHAEL RODAK, JR., CLERK

No. 75-1462.

IN THE

Supreme Court of the United States

DELAWARE REPUBLICAN STATE COMMITTEE, et al.,
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v.

B. WILSON REDFEARN, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

WILLIAM O. LAMOTTE, III,
THOMAS REED HUNT, JR.,
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INDEX.

TABLE OF AUTHORITIES.

IN THE

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No. 75-1462.

—

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

———

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

1. Whether this Court should decide issues neither presented to nor decided by the Court of Appeals below.

2. Whether this case presents justiciable issues.

3. Whether the District Court properly applied the one person-one vote principle of *Baker v. Carr* to the process whereby the Delaware Republican Party nominates the Republican candidate for each state-wide and national political office.

COUNTERSTATEMENT OF THE CASE.

Seeking a fair voice in the selection of the Republican nominees for state-wide and national public office, respondents (appellees below) brought this action individually and on behalf of all registered Republicans in the Second Republican Convention District of the State of Delaware. The Second District is one of four geographical convention districts into which the Delaware State Republican Party years ago divided the State of Delaware, and it has become by far the largest convention district in terms of general population, registered Republican party members, and historical Republican vote at the polls.

Respondents sought relief from an entrenched state convention delegate allocation system, which gave each Republican in other convention districts nearly three times the voting power of a Republican residing in the Second District in nominating Republican candidates for state-wide and national office and nearly six times such voting power in selecting Delaware's delegates to the Republican National Convention.

The Republican Party of the State of Delaware selects its nominees for state-wide and national office through the mechanism of a party convention.[1] Prior to a change in the party rules that followed the judgment of the District Court herein, the selection of delegates to the nominating convention was dictated by a rule of the Republican State Committee requiring, in relevant part, that 55% of the total delegates be distributed equally among the four convention districts. Similarly, the prevailing practice with respect to election of Delaware's delegates to the Republican National Convention was to allocate 100% of such delegates

1. Subject only to a possible primary between the convention winner and the convention runner-up if the runner-up receives on the final polled vote at least 35% of the convention delegate vote. 15 *Del. C.* 1953, § 3116 [now 15 *Del. C.* 1974, § 3113].

equally among the four convention districts. Since the convention districts vary dramatically in terms of population, registered Republicans, and historical Republican votes cast, these requirements resulted, as the District Court found, in gross distortions in voting power among similarly-situated Republicans throughout the state. The fact of such inequality in voting power has never been in dispute in this case.

The District Court, relying substantially upon the rationale of this Court's decision in *Gray v. Sanders,* 372 U. S. 368 (1963), initially granted summary judgment for respondents and affirmatively ordered the Republican party to refrain from allocating delegates on the challenged basis and further ordered the party to effect a constitutionally tolerable allocation formula. *Redfearn v. Delaware Republican State Committee,* 362 F. Supp. 65 (D. Del. 1973).

Petitioners appealed to the Third Circuit Court of Appeals, arguing, among other things, that the discrimination practiced against registered Republicans living in the Second District was protected first amendment activity and that the questions presented in the case were non-justiciable. However, the Court of Appeals did not reach the merits; it *held* simply that, since the relief requested included injunctive relief, a statutory three-judge court was required, and that, therefore, the District Court had had no jurisdiction in the matter. Judge Gibbons and Judge Aldisert came to this conclusion for different reasons as set forth in separate opinions. Judge Rosenn, who would have reached the merits, filed a dissenting opinion. *Redfearn v. Delaware Republican State Committee,* 502 F. 2d 1123 (3d Cir. 1974).

On remand, respondents eliminated the jurisdictional infirmity by withdrawing their request for injunctive relief.

Concluding that the holding of the appellate panel was only that a statutory three-judge court had been required in order to grant the relief originally sought, Chief Judge Latchum reinstated the declarative portions of his former judgment. *Redfearn v. Delaware Republican State Committee*, 393 F. Supp. 372, 374-75 (D. Del. 1975).[2] Although not bound by the mandate to speak to issues raised by only one of the three appellate judges, the District Court, in commendable deference, elected to do so with respect to an issue raised only by Judge Gibbons.[3]

The focus of the comments of the District Court was upon a basic premise underlying the thesis of Judge Gibbons. Judge Gibbons was of the belief that, if certain provisions of the Delaware election laws were struck down as unconstitutional,[4] then a superseded section of the prior Delaware election laws would, he believed, become operative,[5] and he read that section as giving any Republican aspirant the right to initiate a direct primary regardless of the action taken at the nominating convention. 502 F. 2d at 1126. In effect, Judge Gibbons was suggesting, as an "alternative" to requiring, as the District Court had done, that the convention delegates be properly apportioned, that the nominating convention be deprived of the legal power to finally select the party nominee. Judge Gibbons

2. The judgment is set forth in Respondents' Appendix 1a.

3. "Nevertheless, while this Court may not be bound to consider the issue raised by Judge Gibbons since it was not a matter upon which a majority of the division agreed and consequently was not within the compass of the mandate, this Court appears to be free to consider that issue as a matter of discretion. [Citation omitted]." 393 F. Supp. at 375.

4. The laws which Judge Gibbons would strike provide that access to the general election ballot is through nomination at a party convention, except that a runner-up candidate who receives at least 35% of the convention delegate votes has a right to have a run-off direct primary. 15 *Del. C.* 1953 §§ 3116 and 3301(c) [now §§ 3313 and 3301(e)(1)]; Respondents' Appendix 3a-4a.

5. 15 Del. C. 1953 § 3107; Respondents' Appendix 4a.

was careful to state that he was not insisting upon this alternative but merely that it should have been *considered* as a possibility, 502 F. 2d at 1128, which was the basis upon which he ruled that a statutory three-judge panel was required. *Id.* at 1128-29.[6]

It is clear from his opinion that the viability of Judge Gibbons' suggested "alternative" turned on his understanding of the manner in which the prior election law operated. In a carefully reasoned and documented treatment of that issue, the District Court on remand ruled that the prior Delaware election law in fact did not bestow a right upon any aspirant for state-wide and national office to a direct primary election, and that, therefore, to declare Sections 3116 and 3301(c) unconstitutional would not have the effect anticipated by Judge Gibbons. 393 F. Supp. at 378. Moreover, since neither the present nor former election laws spoke at all to election by primary of Delaware's delegates to the Republican National Convention, no amount of destruction of the current laws would have provided an alternative to convention delegate apportionment with regard to this aspect of the case. *Id.* at 378.

Petitioners again appealed. But, significantly, *they did not ask the Court of Appeals to pass upon the merits of the decision of the District Court.* The appeal focused very narrowly on the question of whether Judge Gibbons' interpretation of the prior Delaware election law was binding upon the District Court and whether the District Court had been required by the mandate to conclude that its initial decision could not be reinstated. In short, peti-

6. Judge Aldisert adopted none of this reasoning. He based his finding that a three-judge panel was compelled on the ground that the challenged Republican party rule itself had "the efficacy of an administrative regulation". 502 F. 2d at 1129. The petition for certiorari constantly refers to the "opinion of the court" where the subject matter being discussed clearly relates only to views of Judge Gibbons.

tioners directed their appeal to the issue of whether the District Court had failed to obey the mandate of the Court of Appeals. As stated in petitioners' "Designation of Issues Presented" [7], the only issues tendered to the Court of Appeals for consideration were:

> "1. Did the majority of the sitting panel of the Circuit Court of Appeals find that the initial decision of the District Court intruded upon defendants' First Amendment right of association?
>
> "2. May the District Court, on remand, substitute its own interpretation of the questioned statutes, for that given by the Court of Appeals, thereby attempting to avoid the mandate of the Court of Appeals?" [8]

Judge Aldisert sat on the panel that heard this second appeal, and he rendered the judgment of the court, which spoke directly to the issues presented:

> ". . . [T]he court having concluded that the majority members of the court at 502 F. 2d 1123 agreed only that a challenge to the internal rules of the Republican State Committee of Delaware for the allocation of delegate seats in that party's state convention which challenge requested injunctive relief thereby requiring the convening of a three-judge court, and this court recognizing that neither Judge Gibbons nor Judge Aldisert reached the merits of the controversy, it is
>
> ADJUDGED AND ORDERED that the judgment of the district court be and the same is hereby affirmed." [9]

7. See Fed. R. App. P. 30(b).
8. Respondents' Appendix 5a.
9. Petitioners' Appendix 1a.

Petitioners are therefore wrong in asserting here that the judgment order of the Court of Appeals conflicts with the opinion of the first panel or with a decision of any other court of appeals. The issues which petitioners here claim require the immediate consideration of this Court were not presented to the Court of Appeals. That court did not reach the merits for the simple reason that it was not asked to do so.

ARGUMENT.

I. This Case Does Not Evidence a Split in Opinion Between the Third Circuit Court of Appeals and Any Other Circuit Court of Appeals.

Thirteen years ago this Court explicitly left open the question of the applicability of the one person-one vote principle announced in *Baker v. Carr* to a state nominating convention. *Gray v. Sanders*, 372 U. S. 368 (1963). Petitioners now ask the Court to address this issue in a case devoid of the aid which normally would be supplied by a decision by the Court of Appeals on the merits of the contentions they advance.

It has long been the practice of the Supreme Court to avoid deciding issues which the court below was neither asked to decide nor did decide. *E.g., Duignan v. United States*, 274 U. S. 195 (1927) and cases cited at p. 200. At trial in *Duignan*, an action seeking, among other things, to have a lease forfeited under Section 23 of the National Prohibition Act, defendant "drew in question the constitutionality of the forfeiture of his leasehold as a denial of due process of law." 274 U. S. at 197. The district court granted the relief sought by the complaint, and the court of appeals affirmed. On appeal this Court affirmed the decree but refused to pass upon the constitutional issue which appellant sought to tender:

> "We do not consider the constitutionality of the forfeiture under § 23. The court below enumerating the questions raised and presented made no mention of the constitutional question. The assignment of errors below did not refer specifically to it as required by the rules of that court, and so far as the record discloses, it was not presented there. See United States v. Jaffney (C. C. A. 2d) 10 F. (2d) 694, 696. This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."
>
> *Duignan v. United States, supra* at 200.

More recently, in *Adickes v. Kress & Co.*, 398 U. S. 144 (1970), plaintiff, asserting a civil rights claim, sought to have this Court review the district court's denial of her motion to amend her complaint but failed to press the point before the court of appeals. This Court refused to consider the question:

> "Although in our certiorari petition, petitioner challenged this ruling, and asked this Court to review this statute by overruling the holding the the Civil Rights Cases, 109 U. S. 3 (1883), examination of the record shows that petitioner never raised any issue concerning the 1875 statute before the Court of Appeals. Accordingly, the Second Circuit did not rule on these contentions. Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."
>
> *Adickes v. Kress & Co., supra* at 147 n. 2.

Accord, Lawn v. United States, 355 U. S. 339, 362-363 n. 16 (1958); *Husty v. United States*, 282 U. S. 694, 701-02 (1932). Nothing herein suffices as a compelling reason to avoid this established rule.

II. The Issues Raised By the Complaint Are Justiciable.

Petitioners' contention that this case presents non-justiciable issues does not withstand analysis in light of the teachings of *Baker v. Carr*, 369 U. S. 186 (1962).

While a major political party is a "political" creature for many purposes, nonetheless, certain of its actions done under color of state law do present an appropriate opportunity for the exercise of federal judicial power. *Smith Allwright,* 321 U. S. 649 (1944); *Terry v. Adams,* 345 U. S. 461 (1953); *Gray v. Sanders,* 372 U. S. 368 (1963).[10]

The standards for determining if a particular issue presents a non-justiciable "political question" were articulated by this Court in *Baker v. Carr:*

> ". . . Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. . . ."
>
> *Baker v. Carr, supra* at 217.

10. While *Smith* and *Terry* were decided under the fifteenth and not the fourteenth amendment, petitioners have cited no opinion of this Court, and we have found none, indicating that the degree of state involvement necessary to find state action under the fourteenth amendment and thereby confer jurisdiction on a federal court, differs from that necessary under the fifteenth amendment.

All of these standards are extricable from the case at bar. Petitioners assert no "textually demonstrable constitutional commitment of the issues to a coordinate political department", and there is none. Nor is there a lack of judicially discoverable and manageable standards for resolving the question presented below. As this Court stated, in *Baker v. Carr:*

> ". . . The question here is the consistency of state action with the Federal Constitution. . . . Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."
>
> *Baker v. Carr, supra* at 226.

And, in light of this Court's holding in *Gray v. Sanders, supra,* it is settled that when a major political party, found in a particular context to be cloaked with the mantel of state action, exercises an electorial function, the safeguards of the equal protection clause affect the range of policy choices available to it. In such a context, the "initial policy determination" has been made by the fourteenth amendment. *Baker v. Carr, supra; Gray v. Sanders, supra.*

The issues here presented are no less justiciable under the remaining *Baker v. Carr* formulations. There is no threat of a judgment expressing lack of respect for a coordinate branch of government, no unusual need for unquestioning adherence to a political decision, and no threat of differing pronouncements from various governmental departments.

Under these tests it seems plain that the complaint here presented a justiciable, "non-political" question over which the District Court correctly exercised its jurisdiction.

III. The District Court Protected Petitioners' First Amendment Rights and Confined Itself Only to Discrimination That Substantially Diminished Voting Rights.

In Delaware, as elsewhere, the Republican Party is in large measure a private association. Its intra-party rules, deliberations, policies, and activities are not fit topics for judicial deliberation. The District Court was well aware of this, 362 F. Supp. at 73, and focused its decision narrowly upon the specific aspects of the Republican Party's nominating activities that directly and substantially affected the practical value of the exercise of the right to vote.[11]

Insofar as the Delaware Republican Party has, through statute, rule, and custom, come to exercise the power to select by convention the nominees for state-wide and national office, and thus eliminate or drastically narrow the

11. Notwithstanding petitioners' repeated broad references to interference by the District Court with "internal political deliberations", the declaratory judgment of the District Court (Respondents' Appendix 1a) relates only to the manner of selecting delegates to Republican state *nominating* conventions at which the Republican nominees for state-wide and national office are selected. These are held bi-annually. The odd-year Republican state conventions and all other aspects of party organization, procedure, management, and activity remain completely unaffected by the judgment.

Moreover, the District Court's sensitivity to petitioners' first amendment rights was evident even during the dispute between the parties over the proper scope of injunctive relief when, prior to the first appeal and remand, that was still an issue in the case. See, for example, the Order Denying Plaintiffs' Motion for Reargument, August 13, 1973, in which the court declined to dictate the allocation of delegates, leaving this to the party and requiring only that "the result bear a reasonable relationship to the concept of equal representation of 'potential party members'" (Respondents' Appendix 7a).

range of Republican choices available to the electorate, it is performing a function not wholly private. In this captive electorial function the party is constrained by certain guarantees of the Constitution. It seems plain, for example, that a major political party could, as a matter of deliberation and policy, endorse the repeal of the thirteenth amendment and that no judicial review of that decision would properly be available. But it is equally clear that such a party could not restrict access to its primary ballot racially, and, if it attempted to do so, federal courts could provide a remedy. *Smith v. Allwright, supra.* Discrimination which affects voting rights and is based upon the place where one happens to live is no less invidious. In *Gray v. Sanders,* this Court stated:

> ". . . [T]here is no indication in the Constitution that homesite . . . affords a permissible basis for distinguishing between qualified voters within the State." 372 U. S. at 380.

The delegate apportionment scheme here impairs the right to vote by denying to respondents an equal starting place in the competition for selection of the party's nominees. As in *Baker v. Carr,* discrimination here can only continue because the discrimination itself assures that those made favorites by it will retain the power to perpetuate it. The role which the Republican Party plays in Delaware in the nomination and election of state-wide and national public officials is simply too crucial for the federal courts to countenance the sort of gross disparity in voting power between similarly situated individuals that the undisputed facts of this case demonstrate.

The District Court correctly understood the distinction between conduct of a major political party which is protected by the first amendment from governmental inter-

ference and that conduct which, because it impacts so significantly on the effective exercise of the franchise, is subject to judicial review and safeguards of the equal protection clause.

CONCLUSION.

This case presents no decision of the Third Circuit Court of Appeals on the merits of the issues presented by the petition. The Court of Appeals was neither asked to nor did it address these questions. In any case, the District Court's judgment is correct. Therefore, the petition should be denied.

Respectfully submitted,

WILLIAM O. LAMOTTE, III,
THOMAS REED HUNT, JR.,
WILLIAM T. ALLEN,
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Counsel for Respondents.

May 12, 1976.

RESPONDENTS' APPENDIX.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 4528

B. WILSON REDFEARN, JOAN ZIMMERMAN, RICHARD E. COLGATE, FRANCIS A. PAINTIN, DONALD R. KIRTLEY, Individually and on behalf of all other similarly situated,

Plaintiffs,

v.

DELAWARE REPUBLICAN STATE COMMITTEE and HERMAN C. BROWN, Chairman,

Defendants,

BASIL R. BATTAGLIA, RAYMOND T. EVANS, MARY L. SIMS, ALEXANDER DE STEPHANO and JANE BADDORF,

Intervening Defendants,

JAMES H. BAXTER, JR., GEORGE A. BRAMHALL, FLORENCE E. CRAEMER, HARVEY H. LAWSON and WILLIAM D. STEVENSON, SR.,

Intervening Defendants,

CHARLES G. LAMB, EVELYN H. WOOD, ALLEN HEDGECOCK, ALLEN HAAS, ANDREA L. BARROS and JOHN DAVIS,

Intervening Defendants.

JUDGMENT.

The Judgment of this Court entered in this case on August 20, 1973 having been reversed by the Court of Appeals for the Third Circuit on July 24, 1974 and remanded to this court for further proceedings consistent with the opinion of the Court of Appeals (Docket Item 37), and it further appearing that the plaintiffs have withdrawn their demand for injunctive relief (Docket Item 38) so that the case may proceed before this single judge court and further proceedings having been had by this Court, now therefore, for the reasons set forth in this Court's opinions of July 27, 1973, August 13, 1973 and April 2, 1975, respectively, it is hereby

ORDERED, DECLARED AND ADJUDGED that:

1. The formula set forth in existing Rule 2 of the Rules of the Republican State Committee for the allocation of delegates and alternate delegates to the Republican State Nominating Convention is inconsistent with the one-man, one-vote principle and thus violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. The present and traditional practice of the Republican State Committee of allocating Delaware's delegates and alternate delegates to the Republican National Convention equally among the existing four Republican Convention Districts is also inconsistent with the one-man, one-vote principle and thus violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

Dated: April 2, 1975.

JAMES L. LATCHUM,
Chief Judge.

15 Del. C. 1974, § 3113.

Certification of convention nominees for primary election.

The presiding officer and secretary of the convention of any political party shall certify to the several departments of elections, the State Election Commissioner and the Secretary of State the names of all persons receiving at least 35% of the eligible votes cast on the final polled vote in the convention for the nomination of United States Senator, Representative in Congress, Governor and other state offices. The final polled vote shall be when 1 of the nominees for each of the above offices shall have received a vote greater than 50% of the total number of eligible delegate votes at such convention. Such certification shall be made within 5 days of such final vote. When the names of 2 such persons are so certified with respect to any office, a primary election shall be held on the Saturday immediately following the first Monday in September in all districts in which votes may be cast at the general election for that office and in the same manner as elsewhere provided in this title for primary elections, provided that the person receiving the lesser number of votes at the convention with respect to any office, shall, within 5 days of such final vote give notice pursuant to § 3106(a)(1) and (b) of this title. (15 Del. C. 1953, § 3116; 57 Del. Laws, c. 241, § 8; 57 Del. Laws, c. 567; § 18F; 58 Del. Laws, c. 258, § 8.)

15 Del. C. 1974, § 3301(e).

Certificates of nominations.

(e) No candidate for the office of elector of President and Vice-President, United States Senator, Representative in Congress, Governor or other state officer to be voted for on a statewide basis, shall be deemed nominated and no

certificate of nomination for such candidate shall be made or filed, nor shall the name of any such candidate be placed on the ballot in any general election in this State, unless the candidate:

(1) Shall have been so nominated by receiving more than 50% of the eligible delegate vote on the final polled vote of a state nominating convention of the political party advancing his candidacy, at a convention held not later than the fourth Saturday in July in the year of such general election and who was not required to run in a primary; or

(2) Shall have received a majority of the votes cast by registered voters of the political party advancing his candidacy at a statewide primary election held pursuant to the provisions of Chapter 31 of this title.

15 Del. C. 1953 § 3107 (stricken in its entirety by 57 Del. Laws, Ch. 241 (1969)).

Notice by person desiring to be candidate.

Any person desiring to be voted for as a candidate for nomination at any primary election shall notify the County Committee of the political party of which he is a member, in writing at least 15 days before such primary election is to be held.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—

(D. C. Civil No. 4528)
No. 73-1916

—

B. WILSON REDFEARN, JOAN ZIMMERMAN, RICHARD E. COLGATE, FRANCIS A. PAINTIN, DONALD R. KIRTLEY, Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DELAWARE REPUBLICAN STATE COMMITTEE, and Chairman, HERMAN C. BROWN,

Defendants,

BASIL R. BATTAGLIA, RAYMOND T. EVANS, MARY L. SIMS, ALEXANDER A. DeSTEPANO, and JANE BADDORD,

Intervening Defendants,

CHARLES G. LAMB, EVELYN H. GREENWOOD, ALLEN HEDGECOCK, ALLEN HAAS, ANDREA L. BARROS, and JOHN DAVIS, Individually and as Officers of the Kent County Republican Committee,

Intervening Defendants,

DELAWARE REPUBLICAN STATE COMMITTEE, et al.,

Appellants.

APPELLANTS' DESIGNATION OF PORTIONS OF THE RECORD ON APPEAL TO BE PRINTED IN APPENDIX AND DESIGNATION OF ISSUES PRESENTED.

COME NOW, the Appellants, and designate the following portions of the record on appeal in the above entitled case to be printed as an Appendix to the briefs, as provided by Rule 30 of the Federal Rules of Appellate Procedure. The numbers used in this Designation refer to the numbers affixed to the documents by the Clerk of the District Court.

47. Opinion of the District Court, Latchum, J.

48. Judgment of the District Court, Latchum, J.

Appellants further state that the issues which they intend to present on appeal are as follows:

1. Did the majority of the sitting panel of Circuit Court of Appeals find that the initial decision of the District Court intruded upon the defendant's First Amendment Right of Association?

2. May the District Court, on remand, substitute its own interpretation of the questioned statutes, for that given by the Court of Appeals, thereby attempting to avoid the mandate of the Court of Appeals?

Please take notice that within ten (10) days of receipt of this Designation, you must serve upon the undersigned a Designation of any additional portions of the record which you deem necessary to include in the Appendix.

BIGGS & BATTAGLIA,
By: /s/ VICTOR F. BATTAGLIA,
Victor F. Battaglia,
1206 Farmers Bank Building,
Wilmington, Del. 19899
Attorney for Appellants.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

—

Civil Action 4528

—

B. WILSON REDFEARN, JOAN ZIMMERMAN, RICHARD E. COLGATE, FRANCIS A. PAINTIN, DONALD R. KIRTLEY, Individually and on behalf of all others similarly situated,
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Intervening Defendants,

CHARLES G. LAMB, EVELYN H. GREENWOOD, ALLEN HEDGECOCK, ALLEN HAAS, ANDREA L. BARROS and JOHN DAVIS,
Intervening Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR REARGUMENT.

The Court having considered the motion by the plaintiffs, other than Redfearn, for reargument, it is

ORDERED that the said motion is hereby denied.

The Court held in its opinion of July 27, 1973 that the Delaware Republican State Committee's present formula for apportioning delegates to the Republican State and National Conventions failed to comport with the one man, one vote principle and therefore denied equal protection in the nominating process. While the Court left it up to the Republican Party to determine the proper constituency to be equally represented in the nomination process, it did define the outer boundaries of the Party's discretion by suggesting that the one man, one vote principle could be achieved by basing apportionment on total population, on registered Republican voters, or prior Republican voting or some combination of these so long as the result bears a reasonable relationship to the concept of equal representation of "potential party members." The Court is aware that "potential party members" is a theoretical concept not capable of exact measurement. Thus, the Party will be required to use the best available approximation of potential party voters, even if this measure is imperfect and somewhat unequal. See Comment, *Bode v. National Democratic Party*, 85 Harv. L. Rev. 1460, 1468-1476; Note, One Man, One Vote and *Selection of Delegates to National Nomination Convention*, 37 U. Chi. L. Rev. 536, 549-551.

Dated: August 13, 1973.

JAMES L. LATCHUM,
United States District Judge.

Supreme Court, U. S.
FILED
AUG 20 1976
MICHAEL RODAK, JR., CLERK

No. 75-1462.

IN THE

Supreme Court of the United States

DELAWARE REPUBLICAN STATE COMMITTEE, et al.,
Petitioners,

v.

B. WILSON REDFEARN, et al.,
Respondents.

RESPONDENTS' SUGGESTION OF MOOTNESS AND MOTION TO VACATE AND REMAND.

WILLIAM O. LAMOTTE, III,
THOMAS REED HUNT, JR.,
WILLIAM T. ALLEN,
MORRIS, NICHOLS, ARSHT & TUNNELL,
Twelfth and Market Streets,
Wilmington, Delaware. 19801
Counsel for Respondents.

INDEX.

TABLE OF AUTHORITIES.

No. 75-1462.

IN THE

Supreme Court of the United States

—

DELAWARE REPUBLICAN STATE COMMITTEE, ET AL.,

Petitioners,

v.

B. WILSON REDFEARN, ET AL.,

Respondents.

—

RESPONDENTS' SUGGESTION OF MOOTNESS AND MOTION TO VACATE AND REMAND.

Respondents suggest that the controversy at bar has in principal part been rendered moot by legislation passed by the Delaware General Assembly and signed by the Governor of Delaware on August 9 and 10, 1976, subsequent to this Court's granting of the writ of certiorari in this action. Moreover, because of the fundamental alterations which this legislation has effected in the role of the political party convention in the electoral process in Delaware, any ancillary issue that arguably has not been mooted should be considered in the context of the new legislation.

Accordingly, respondents suggest that it is appropriate for the Court to vacate the judgment of the Third Circuit Court of Appeals and remand the cause to the District Court of Delaware with directions to dismiss the entire cause as moot, or, in the alternative, with instructions to the District Court to reconsider any residual issues in light of the intervening legislation.

I. Statement of the Case.

A full statement of the case is not necessary to consideration by the Court of this suggestion of mootness. We refer the Court to the Brief of Respondents in Opposition to the Petition for a Writ of Certiorari at pp. 2-7.

The declaratory judgment at issue herein resulted from an action brought by respondents (appellees below), individually and on behalf of all registered Republicans in the Second Republican Convention District of the State of Delaware, in the United States District Court for the District of Delaware seeking relief from the state convention delegate allocation formula whereby the Delaware Republican Party allocated delegates to the Republican state nominating conventions among the four state convention districts and from the Delaware Republican Party's traditional formula for allocating Delaware's delegates to the Republican National Convention. Respondents asserted that such allocation denied them a fair voice in the selection and nomination of Republican candidates for statewide and national public office.

The District Court granted summary judgment for respondents and ordered the Republican State Committee to refrain from allocating convention delegates on the challenged basis and to institute a constitutionally tolerable allocation formula. *Redfearn v. Delaware Republican State Committee,* 362 F. Supp. 65 (D. Del. 1973).

Petitioners appealed the District Court judgment to the Third Circuit Court of Appeals, arguing, *inter alia,* that the discrimination in the nomination process which resulted from the constitutionally defective delegate allocation formula was protected first amendment activity, and that the questions presented in the case were nonjusticiable. The Court of Appeals declined, however, to reach the merits of petitioners' claims, holding simply that

the District Court had lacked jurisdiction to hear respondents' request for injunctive relief. As a consequence, the cause was remanded to the District Court. *Redfearn v. Delaware Republican State Committee,* 502 F. 2d 1123 (3d Cir. 1974).

On remand, respondents withdrew their request for injunctive relief, thereby curing the jurisdictional infirmity. The District Court then reinstated the declaratory portions of its earlier judgment. *Redfearn v. Delaware Republican State Committee,* 393 F. Supp. 372 (D. Del. 1975).

Petitioners again appealed; the Court of Appeals affirmed without discussion of the merits. Application was made to this Court for a writ of certiorari, and on June 7, 1976, the writ was granted.

Subsequent to the granting of the writ of certiorari, the Delaware General Assembly enacted legislation titled "An Act to Amend Chapter 31, Title 15 of the Delaware Code Relating To Primary Elections and Nominations of Candidates, and Providing for a Direct Primary". 60 Del. Laws Ch. 712 (August 9, 1976) (referred to hereinafter as the "Direct Primary Act").[1]

The effect of the Direct Primary Act is to eliminate entirely the party convention as the means of nominating party candidates for state-wide and national office and to require that such nomination be by open primary. Respondents submit that the principal issue of this case is thereby rendered moot.

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1. A companion bill changing the effective date of the legislation from January 1, 1976 to January 1, 1978 was also enacted. 60 Del. Laws Ch. 713 (August 10, 1976). As discussed *infra,* this amendment does not impair the mooting impact of the legislation. Both acts are set forth in Appendix "A" hereto.

II. The Mootness Question: Allocation of Delegates to the Republican State Nominating Convention; Nomination of Candidates for Public Office.

A cause is considered moot when either of the parties retains no "legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U. S. 486 (1969). Applying this standard to this case, we submit that a determination by this Court of the issues presented will have no effect on petitioners' asserted legal "right" to nominate candidates for public office at a Republican state nominating convention without being required to allocate delegates to that convention in accordance with the one-man, one-vote requirement of the equal protection clause of the fourteenth amendment.

In the first District Court opinion, which forms the basis for the judgment on review here, the court held that the party convention nominating process is "state action".

> "Delaware, instead of prescribing a direct primary for nominating candidates for National and State-wide offices, has simply authorized the utilization of party nomination conventions as a substitute method of making nominations. Since the functions performed by the selection procedure—the nomination of candidates—is the same as that performed by a direct primary, which is governed by the Fourteenth Amendment, it logically and rationally follows that the party convention nominating process is 'state action' and the Court so concludes.
>
> • • •
>
> "This Court therefore holds that the one man, one vote principle applies to the selection of delegates to the Republican State nominating convention because that process is an integral part in the State's scheme of public elections." 362 F. Supp. at 71.

The finding of state action was basic to the court's ultimate conclusion that the equal protection clause was applicable to the manner of allocation of delegates to the convention and that, applying the fourteenth amendment standards, the convention delegate allocation formula, set forth in old Rule 2 of the Rules of the Republican State Committee, ". . . violate[s] plaintiffs' rights under the equal protection clause of the Fourteenth Amendment as [the practice] violate[s] the one-man, one-vote principle." 393 F. Supp. at 379.

Clearly, the District Court subjected the Republican state convention to fourteenth amendment "one-man, one-vote" scrutiny only *after* it had determined that the Republican Party was performing an electoral function at its convention by nominating candidates for elective office. If the Direct Primary Act were to make it impossible for Delaware Republicans to undertake electoral functions at convention, the convention's adherence to "one-man, one-vote" guidelines would be unnecessary, and this action would be rendered entirely moot.

The Direct Primary Act states in relevant part:

> ". . . the nomination of candidates by all political parties for all offices to be decided at a general election shall be conducted by direct primary." 60 Del. Laws Ch. 712, § 1. (Appendix "A").

This legislation is precisely tailored to remove the principal electoral function—the nomination of candidates for public office—from the ambit of state political party convention authority.

The Direct Primary Act renders this controversy moot, notwithstanding that its effective date is January 1, 1978. The declaratory judgment refers only to the "Republican State Nominating Convention", which is held "not later than the fourth Saturday in July in the year of [the] general election". 15 *Del. C.* § 3301, *as amended,* 60 Del. Laws Ch. 447, § 4 (June 7, 1976).[2] The Delaware Constitution provides that general elections shall be "held biennially". *Del. Const.,* Art. V, § 1. The Republican state nominating convention for 1976 is history; there will be no further nominating convention prior to January 1, 1978, the effective date of the Direct Primary Act.

The possibility exists that a special election, and thus a special nominating convention, may be required prior to the effective date of the primary bill. However, the only state-wide office for which a special election is provided by Delaware law is the office of United States Representative, and even here, the Governor of Delaware has the discretion to declare the day of the next general election as the day for the election to fill the vacancy. 15 *Del. C.* §§ 7301, 7302.[3] Since Delaware is represented by a single United States Representative, the likelihood of the need for a special election comes down to the likelihood of one person in one office vacating that office. We submit that such an event is sufficiently improbable as not to be an adequate basis for the Court to decline to determine that the case is moot. *See Hall v. Beals,* 396 U. S. 45 (1969).

2. The odd-year Republican state convention provided for by the Rules of the Republican State Committee devoted to intra-party affairs, including election of the Republican State Committee and its officers. It is not involved in this case.

3. Other vacancies in state-wide elective offices are filled by gubernatorial appointment. *Del. Const.,* Art. III, § 9.

More importantly, even if a special election should be required, and a special nominating convention convened, there will be no new election of delegates to that convention (and thus no new allocation of delegates) because Rule 19 of the Rules of the Republican State Committee—not here in issue—expressly provides that the delegates to the most recent nominating convention will serve as the delegates to any subsequent special nominating convention. Rule 19 reads in relevant part:

> ". . . The State Committee may call, if necessary, a special Nominating Convention at any time to consider the business reserved to Nominating Conventions in RULES 17 and 18 hereof. Notwithstanding adjournment of a previous Nominating Convention, the State Committee shall designate the delegates to the most recent Nominating Convention as the delegates to the special Nominating Convention."

Thus, the delegates to any special nominating convention which might be called before the effective date of the Direct Primary Act would be those delegates who have already been elected and who have already served at the regular nominating convention for the year 1976. While the remote possibility exists that a special nominating convention could be called, Rule 19 makes explicit that *no* possibility exists that another allocation of delegates would be required. The 1976 convention delegates were allocated among the respective convention districts pursuant to recently amended Rule 2(*b*) of the Rules of the Delaware Republican State Committee,[4] which provides for an allocation formula in accordance with the one-man, one-vote principle. Action taken by these delegates at any special nominating convention therefore runs no risk of

4. Set forth in Appendix "B" hereto.

challenge on constitutional grounds if this case is dismissed now as moot.

In summary, the Direct Primary Act has rendered the principal issue before the Court moot, and the fact that the effective date of the primary bill is January 1, 1978 does not change this result.

III. The Absence of Meaningful Controversy: Allocation of Delaware's Delegates to the Republican National Convention.

Respondents suggest further that the issue of application of the one-man, one-vote principle to the process of distribution and selection of Delaware's delegates to the Republican National Convention has been sufficiently altered by intervening events that the issue in its present posture before this Court no longer comprises a controversy presenting the "concrete legal issues, presented in actual cases, not abstractions" that is a prerequisite to the adjudication of constitutional issues. *United Public Workers v. Mitchell*, 330 U. S. 75 (1947). The considerations here are somewhat different than those discussed in Section II, *supra*, because the Direct Primary Act does not speak directly to the manner of selection or allocation of such delegates. However, we submit that the consequence of passage of the Direct Primary Act, together with the further considerations set forth hereinafter, justify the conclusion that the national convention delegate issues, if they are before this Court at all,[5] are no longer ripe for meaningful determination.

At the very least, the context in which the District Court decided the national convention delegate issues has

5. Respondents believe that the "Questions Presented" in the Petition for Writ of Certiorari do not raise these issues. However, having in mind this Court's Order granting the writ of certiorari, which was general in scope, Respondents address this national delegate allocation question.

been so fundamentally altered by the Direct Primary Act that the only appropriate course for this Court to now adopt, we submit, would be to remand these questions to the District Court and afford it an opportunity to re-examine them in light of the altered circumstances.

First, with the elimination by the Direct Primary Act of the principal purpose for the convening of nominating conventions—nomination of the Republican candidates for elective office—the value of the nominating convention as an institution to the party is substantially reduced, and its survival in *any* form is now a matter of conjecture. The only traditional electoral functions of such conventions not actually precluded by the Direct Primary Act are the election of Delaware's delegates to the Republican National Convention and the nomination of Presidential electors, and nothing in Delaware now *requires* that even these functions be carried out by party convention.[6] Whether the party will undertake the considerable expense and effort of even convening a state nominating convention now is unknown. The selection of delegates to the national convention could as well be accomplished, for example, by including the delegate candidates in the mandated direct primary.

Secondly, as noted, *supra*, at 4, the District Court's finding of "state action" in the convention process was largely based on the convention's *nominating* function

6. The Direct Primary Act permits, but does not require, nomination of candidates for the National Electoral College to be by convention. 60 Del. Laws Ch. 712, § 8 (Appendix A). While under prior law it was arguable that election of delegates to a political party's national convention must have been by state convention, *see King v. Willis*, 333 F. Supp. 670 (D. Del. 1971), an amendment to the Delaware Election Law definition of "political party", adopted on the day certiorari was granted herein, made it clear that the required election need not be by convention. (These statutes, 15 *Del. C.* § 101(13), and *as amended*, 60 Del. Laws Ch. 446 (June 7, 1976), are set forth in Appendix C hereto.)

under then applicable state law, as opposed to its function of *electing* national convention delegates.[7]

> ". . . Delaware political parties, by tradition and statute, have become so inextricably intertwined in the State's election process by nominating party candidates for state-wide office and Presidential Electors that their procedures in this regard may rationally be viewed as the 'State' in action, with the consequence that the organization and regulation of such parties must be such as to accord electors equal protection of the laws required by the Fourteenth Amendment." 362 F. Supp. at 70.

The Direct Primary Act has now deprived the state convention of that "nominating" function, and the question arises for the first time whether the residual functions of the convention are sufficiently cloaked, separate and apart from the nominating functions, with the mantle of state action.

The District Court obviously did not have an opportunity to address the national convention delegate issues in this context. Indeed, the District Court's opinion clearly reflects the fact that the manner of allocation of Delaware's delegates to Republican National Conventions was considered only *after* the court had already made the determination that the delegates to the state convention had to be allocated on a one-man, one-vote basis. Thus, it addressed the national convention delegate issues in a posture which, in effect, assumed that the state convention, which would elect such delegates, would already be constitutionally apportioned in its delegate make-up.

> "On the other hand, once the State Convention delegates are elected on a one man, one vote principle,

7. The difference between the party's "nominating" and "electing" functions is explicit under Delaware law. See Appendix "C" hereto.

> it would be constitutionally permissible for the State Convention delegates voting as a whole to select all the Republican National Convention delegates so long as this was done without the present requirement of the State Committee that they come from a particular Convention District. This is so because the National Convention delegates who represent Republicans from the entire State would be representatively selected by the State Convention delegation who had been chosen under the one man, one vote principle." 362 F. Supp. at 71.

Thus, continued litigation of the national convention delegate issues in their present posture before this Court necessarily means that the parties will be attacking or defending determinations of the District Court that were based on premises undermined by the Direct Primary Act. We see no possible prejudice to petitioners arising from a determination that a true controversy with respect to this issue no longer exists, or from a determination to remand this issue to the District Court for further consideration. We submit that further time and effort spent by the parties and this Court on the issues as reflected by the granted petition for certiorari, in the light of the significant intervening legislation, would be unwarranted.

Respectfully submitted,

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August 20, 1976

APPENDIX "A".

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60 Del. Laws Ch. 712 (August 9, 1976).

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO AMEND CHAPTER 31, TITLE 15 OF THE DELAWARE CODE RELATING TO PRIMARY ELECTIONS AND NOMINATIONS OF CANDIDATES, AND PROVIDING FOR A DIRECT PRIMARY."

AN ACT TO AMEND CHAPTER 31, TITLE 15 OF THE DELAWARE CODE RELATING TO PRIMARY ELECTIONS AND NOMINATIONS OF CANDIDATES, AND PROVIDING FOR A DIRECT PRIMARY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Chapter 31, Part III, Title 15 of the Delaware Code by adding thereto a new section, designated as § 3101A, which new section shall read as follows:

"§ 3101A. *Direct Primary Elections*

The nominations of candidates by all political parties for all offices to be decided at a general election shall be conducted by direct primary. All such primaries shall be conducted by the county Departments of Election under the applicable provisions of this Title."

Section 2. Amend § 3101, Chapter 31, Part III, Title 15 of the Delaware Code by striking § 3101 in its entirety, and substituting in lieu thereof:

"§ 3101. *Nomination, Withdrawal and Primary Election Dates*

The following schedule shall apply for all candidates:

(a) Notification of candidacy shall be on or before twelve o'clock noon (12:00 p.m.) of the last Friday in July. In the event the last Friday in July is a legal holiday, then the last day to give notification shall be the next day which is not a Saturday, Sunday or a legal holiday.

(b) Such notification of candidacy may be withdrawn on or before twelve o'clock noon (12:00 p.m.) of the second Friday in August. In the event the second Friday in August is a legal holiday, then the final day to withdraw shall be the next day which is not a Saturday, Sunday or a legal holiday.

(c) Primary elections for all political parties shall be conducted on the first Saturday next following the first Monday in September.

(d) After the deadline for Notification of Candidacy set forth in subsection (a) and before the deadline for withdrawal set forth in subsection (b), a candidate may change his candidacy and become a candidate for a different office in the coming election. Such change of candidacy shall be deemed to be irrevocable withdrawal from candidacy for the first announced office."

Section 3. Amend subsection (a), Section 3103, Chapter 31, Title 15 of the Delaware Code by striking paragraph (4) in its entirety.

Section 4. Amend § 3103, Chapter 31, Part III, Title 15 of the Delaware Code by striking the figure "2%" as

the same appears in subsection (b), and substituting the figure "1%" in lieu thereof.

Section 5. Amend subsection (c), Section 3103, Title 15 of the Delaware Code by striking the words "pursuant to § 3106 of this Title" as they appear in the last sentence thereof and substituting in lieu thereof the words "pursuant to § 3101 of this Title".

Section 6. Amend § 3106, Chapter 31, Part III, Title 15 of the Delaware Code by striking said section in its entirety, and substituting in lieu thereof the following:

"§ 3106. *Filing of Candidacy for Nomination at a Primary Election; Withdrawal*

(a) Any person desiring to be a candidate shall give notice in the following manner:

(1) Candidates for Statewide office:

(i) Any Statewide candidate shall notify the Chairman of the State committee of his respective political party, or his designee in writing, on forms prescribed by the State Election Commissioner on or before the deadline set forth in § 3101(a) of this Title.

(ii) At the time of giving notice as required above, each candidate shall tender the required filing fee, if any, by giving a check to the State Election Commissioner, payable to the State committee of the candidate's political party, together with a copy of the notice given the party's State Chairman. At such time, the Commissioner shall receipt a third copy of said notice, to be provided the candidate.

(iii) Except incumbents, the notification given to the State Election Commissioner shall include nominating petitions signed by not less than two percentum (2%) of the total number of qualified electors of the candidate's party in this State. These petitions shall be prepared by Representative Districts and shall include the signatures, printed names and addresses of all qualified voters signing them. Each petition shall contain a general declaration, subscribed to by each person signing the petition, that such signer is a duly qualified and registered elector of the candidate's party, and is signing the petition under oath. This statement shall be followed by a warning that persons placing illegal signatures on the petition may be subject to prosecution for perjury. Each petition shall also include a statement signed by the person gathering the signatures that such person witnessed the placing of each signature upon the petition.

(2) Candidates for all other offices:

(i) All candidates for county or county-wide offices, members of the General Assembly, and/or municipal office for any municipality holding its election at the time of the general election shall notify the county Chairman, or his designee, in writing (or the city Chairman, or his designee, if applicable for municipal candidates) of their respective political party in their county of residence on forms prescribed by the State

Election Commissioner on or before the deadline set forth in § 3101(a) of this Title.

(ii) At the time of giving notice as required above, each candidate shall tender the required filing fee, if any, by giving a check to the county Department of Elections, payable to the county committee of the candidate's political party (or city committee, if applicable for municipal candidates), together with a copy of the notice given to the party Chairman. At such time, the Department shall receipt a third copy of the notice, to be provided the candidate.

(b) If any of the filing fees mentioned in (a) above are not required, each candidate shall still give notice to the election agency having jurisdiction, as specified in (a)(1) and (a)(2), and shall receive a receipted copy of the prescribed form.

(c) Any candidate who has filed for nomination as required above may withdraw said filing by notifying the respective elections agency with whom he filed on forms prescribed by the State Election Commissioner on or before the deadline set forth in § 3101(b) of this Title. The elections agency having jurisdiction shall promptly notify the same political party Chairman who received the original notice of filing. The filing fee of the candidate so withdrawing shall be returned to him. In the event a candidate withdraws after the deadline set forth in § 3101(b) of this Title, he shall forfeit the filing fee to the political party. In cases where no filing fee was required, any candidate withdrawing after the deadline shall submit to the respective elections agency a check

payable to the Treasurer of the State of Delaware in the amount of fifty dollars ($50.00).

(d) Following the deadline for withdrawal of candidates, the State Election Commissioner shall promptly turn over the filing fee checks of the Statewide candidates to the State Chairmen of their respective political parties. At the same time, the Commissioner shall notify each county Department of Elections of all those Statewide candidates who have qualified under this section.

The county Departments shall also at this time submit to the county Chairman (or city Chairman, if applicable) all filing fee checks from candidates of their respective political parties and shall notify the Commissioner of all persons who have qualified as candidates.

(e) Any notice of candidacy or withdrawal of candidacy required by this section shall include the signature of each candidate, together with his proper and correct name typed or printed, and the address from which he is registered to vote."

Section 7. Amend § 3107, Chapter 31, Part III, Title 15 of the Delaware Code by striking said section in its entirety, and substituting in lieu thereof the following:

"§ 3107. *Determination of Nominee*

Any candidate for party nomination to any office who receives a plurality of the votes cast in his party's primary election for that office shall be the nominee of his party for such office."

Section 8. Amend § 3113, Chapter 31, Part III, Title 15 of the Delaware Code by striking said section in its entirety, and substituting in lieu thereof the following:

"§ 3113. *Nominating Conventions*

The method of nominating candidates for the National Electoral College, for offices within a particular political party, and for formulation of the party platform may be by convention."

Section 9. The provisions of this Act shall become effective on January 1, 1976.

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60 Del. Laws Ch. 713 (August 10, 1976).

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AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO AMEND CHAPTER 31, TITLE 15 OF THE DELAWARE CODE RELATING TO PRIMARY ELECTIONS AND NOMINATIONS OF CANDIDATES, AND PROVIDING FOR A DIRECT PRIMARY."

—

Section 1. Amend an Act entitled "AN ACT TO AMEND CHAPTER 31, TITLE 15 OF THE DELAWARE CODE RELATING TO PRIMARY ELECTIONS AND NOMINATIONS OF CANDIDATES, AND PROVIDING FOR A DIRECTOR PRIMARY" by striking the number 1976 as the same appears in Section 9 of said Act and substituting the number 1978 in lieu thereof.

APPENDIX "B".

Rule 2(b) of the Rules of the Republican State Committee.

For the purposes of the nominating convention referred to in RULE 17, the state shall be divided into seven (7) Convention Districts. Representative Districts 1 - 6 shall be known as the First Convention District. Representative Districts 7 - 12 shall be known as the Second Convention District. Representative Districts 13, 14, 15, 16, 21, and 22 shall be known as the Third Convention District. Representative Districts 17, 18, 19, 20, and 28 shall be known as the Fourth Convention District. Representative Districts 23, 24, 25, 26, 27, and 29 shall be known as the Fifth Convention District. Representative Districts 30 - 35 shall be known as the Sixth Convention District. Representative Districts 36 - 41 shall be known as the Seventh Convention District. The Nominating Convention shall consist of approximately two hundred twenty-three (223) delegates. Each Convention District shall be allotted three (3) delegates for each Representative District within that Convention District for a total of one hundred twenty-three (123). One hundred (100) delegates shall be distributed, as nearly as is practicable, among the Convention Districts on the basis of one (1) delegate for each one percent (1%) of the Republican vote (as determined in subparagraph (a) above).

APPENDIX "C".

15 Del. C. § 101(13), prior to amendment by 60 Del. Laws Ch. 446 (June 7, 1976).

" 'Party' or 'political party' means any political party, organization or association which elects delegates to a national convention, nominates candidates for electors of President and Vice-President, United States Senator, Representative in Congress, Governor, and other offices, and elects a state committee and officers of a state committee by a state convention composed of elected members from each representative district, provided a registered party member is available in each representative district."

15 Del. C. § 101(13), as amended by 60 Del. Laws Ch. 446 (June 7, 1976).

" 'Party' or 'political party' means any political party or political organization which elects delegates who participate in the national convention of a political party, nominates candidates for electors of President and Vice President, United States Senator, Representative in Congress, Governor, and other offices to be presented on the ballot throughout the state, elects state committee and officers of a state committee by a state convention composed of delegates elected from each representative district in which the party has registered members. . . . [remaining provisions not relevant]"

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1462

DELAWARE REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

B. WILSON REDFEARN, *et al.*,

Respondents.

PETITIONER'S RESPONSE TO RESPONDENT'S SUGGESTION OF MOOTNESS AND MOTION TO VACATE AND REMAND

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

Respondents filed their original complaint on December 1, 1972, in the United States District Court for the District of Delaware alleging deprivation of equal voting rights under Title 42, Section 1983 of the U. S. Code. The complaint sought both declaratory and injunctive relief under 28 U.S.C. 2201 and 2202 and specifically an Order compelling the Delaware Republican State Committee to allocate delegates to the Republican State

and National Conventions in a manner conforming to the principle of "one man, one vote." The District Court accepted jurisdiction under 28 U.S.C. 1343(3) and 1343(4) and the case was ultimately decided upon plaintiff's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The complaint challenged the constitutional validity of Rule 2 of the Republican State Committee. (Rule 2 is reflected as Appendix 1 attached herein.) Rule 2 provided for an allocation of 220 State Convention delegates in the following manner: (1) 120 delegates (54.5% of the total delegation) were allocated on the basis of 30 delegates to each of the four state convention districts and (2) the remaining 100 delegates (45.5% of the total delegation) were allocated on the basis of the percentage of the statewide Republican vote cast in certain specified prior elections.

The Republican Party of the State of Delaware is a voluntary association of individuals who have joined together in the furtherance of achieving certain political goals. The Delaware Republican Party is organized in accordance with the rules adopted by previous Republican state conventions held on May 4, 1970 and July 17, 1972. The membership of the Republican Party of Delaware consists of all persons who have indicated that they are Republicans by registering to vote in the State of Delaware.

In every even numbered year the Delaware Republican Party holds a state convention. In past state conventions, individuals were selected as the Party's nominees for national and state offices to be filled in the general election occurring in November of that year. That convention function, the selection of Republican candidates for national and state offices, has been

legislatively terminated. The second session of the 1976 Delaware State Legislature enacted legislation providing for primary elections and nominations of candidates for all offices, both state and Federal within the state. That legislation was enacted after a writ of certiorari was granted by this Court and renders moot certain judicial considerations regarding the application of the principle of one man, one vote to a delegate apportionment formula at a state Party's convention. Respondent's motion correctly describes the effect of that recently enacted legislation and accurately reproduces same in Appendix A.

Notwithstanding the termination of that convention function, in Presidential election years, the Republican State Convention will continue to select the individuals who shall serve as Delaware's Republican delegates and alternate delegates to the National Convention of the Republican Party. In other years the Republican State Convention is held for the purpose of electing a state chairman of the Republican Party and members of the Republican State Committee. The respondents have also challenged the allocation formula by which the Delaware delegates and alternates to the Republican National Convention are elected. Until Rule 2 was amended, the Delaware Party historically allocated these delegates on the basis of three delegates and three alternates from each of the four state convention districts.

Like the establishment of the challenged Rule 2 and the apportionment of delegates to the National Convention, the designation of four state convention districts resulted from the internal deliberations of the State Party at previous state party conventions. No state or Federal statute exists mandating the number of

state convention districts to be employed by either political party within the state and, similarly, no statute exists directing the method of selection of delegates to either the Delaware State Party convention and, from it, to the Republican National Convention. The State does provide the mechanics to determine, on any given day, the number and identity of registered Republicans within its borders. That number, of course, is fluid, changing daily with the whims and caprices of the electorate. Registered Republican voters are not required to vote for the Republican candidates in either primary or general elections.

Respondents alleged a violation of the Equal Protection Clause of the Fourteenth Amendment as the basis for relief. Respondents asserted that their voting strength had been unconstitutionally diluted in that their representation at the Republican State Convention and in the delegation to the Republican National Convention was not proportionate to the population, the number of registered Republicans or past Republican electoral strength in the second convention district.

The District Court granted plaintiffs' Motion for Summary Judgment, finding that the existing delegate allocation formula (Rule 2) was violative of the Fourteenth Amendment's guarantee of equal protection. The District Court enjoined the Republican State Committee from engaging in its practice of allocating a portion of state convention delegates on the basis of equal number of delegates to each convention district and from the traditional practice of allocating Republican National Convention delegates on the convention district basis. The Court ordered the Delaware State Republican Committee to adopt a delegate allocation formula for the state convention

consistent with the "one man, one vote" principle and a similar order was directed to individual district committees. 362 F. Supp. at 74-75. At the time of that ruling and of the subsequent ruling herein by the District Court and the Court of Appeals, the Delaware Republican Convention continued to perform the function of providing Party nominees as candidates for state and Federal offices.

An appeal was taken to the United States Court of Appeals, Third Circuit. A three-judge panel of the Court of Appeals reversed the District Court's judgment and remanded for further proceedings. 502 F.2d 1123 (1974). The three judges filed separate opinions: an "Opinion of the Court" filed by Judge Gibbons, a concurring opinion filed by Judge Aldisert, and a dissenting opinion filed by Judge Rosenn.

The "Opinion of the Court" first addressed itself to "The Effect of the District Court Order" (502 F.2d 1127-1128). Judge Gibbons held that in choosing to rule on the Delaware State Republican Party's own Rule, instead of the state statutes which give the rule the *de facto* force of state law, that the District Court may have unnecessarily intruded upon the state party's First Amendment right of association:

> "But the court's decision to let stand the challenged statutes but hold invalid the internal party rules raises quite serious first amendment issues . . . Many believe that party success in achieving statewide or national political power is intimately related to success in achieving such power in the local substructures of government. Thus the ability of any party in Delaware to organize itself on a district rather than an at large basis may be, or is believed to be, significantly related to its pursuit of the power to impose its

> policies upon government. The freedom to associate for such a pursuit is the heart of the right of association guaranteed by the first amendment." (502 F.2d 1127)

The opinion concluded:

> "The statute under which the state intrudes its action into the party continues to operate, but at the expense of the freedom of association of the party." (502 F.2d 1127)

Judge Gibbons, speaking for the Court, reversed and remanded. ". . . because the district court . . . *did not weigh the highly relevant associational rights of the party*." (502 F.2d 1123 at 1128) (emphasis added). Thus, the Court of Appeals clearly recognized and clearly instructed the District Court to recognize and weigh the First Amendment rights of the Delaware Republican Party.

On remand, the District Court ignored that position of the Court of Appeals' decision requiring that consideration of the First Amendment rights of petitioners be measured against the Fourteenth Amendment claims of respondents. 393 F. Supp. 372 (1975). Instead, the Court somehow concluded that it ". . . may not be bound to consider the issue raised by Judge Gibbons . . ." (393 F. Supp. at 375), and thereafter considered the alternative to declaring Rule 2 unconstitutional. The District Court undertook a lengthy recitation of Delaware state political and statutory history seeking to demonstrate that by declaring the ballot access statutes unconstitutional, no direct party primary would result. (393 F. Supp. 375-379) The District Court was apparently of the erroneous belief that the Court of Appeals' directive related only to possible questions of creating a direct Republican Party

primary by holding state statutes unconstitutional. Such a ruling, the District Court correctly concluded, would not change the allocation of delegates to state party and national party conventions. Having thus partially ruled on the merits of the case, the Court thereupon reinstated its prior judgment.

The District Court's second judgment in this case suffers from precisely the same defects as the first: the Court did not weigh or consider the First Amendment association rights of the petitioners. The Court either ignored or fundamentally misinterpreted the opinion of the Court of Appeals, as Judge Gibbons clearly directed the District Court to consider and weigh the various alternatives to sacrificing the First Amendment rights of the party. (502 F.2d 1128) Yet, the District Court considered only whether declaring state statutes unconstitutional would create a direct party primary. Nowhere does the District Court evidence any consideration or concern for the party's right to organize itself, to set its own goals, or to make political judgments on issues affecting elections and organizational strategy. In short, the question of the party's First Amendment rights was entirely ignored by the District Court.

Appeal from this second judgment was again taken to the Court of Appeals for the Third Circuit. Thereafter, a second panel of that Court, comprised of Judge Aldisert and two different judges, entered a Judgment Order, without opinion, affirming the judgment of the District Court.

The second panel decision does precisely what the Opinion of the Court in the first panel found so objectionable– it evidences no consideration whatsoever for the First Amendment association rights of the petitioners.

ARGUMENT

When the Delaware Republican State Committee sought a Writ of Certiorari to the United States Court of Appeals for the Third Circuit from this Court, despite the fact that the legislation referred to in respondent's motion had not been enacted into law, it suggested the existence of three reasons justifying the issuance of the Writ. Notwithstanding the fact that the legislation is now the law of the Commonwealth of Delaware, the three reasons advanced by petitioners, seeking ceritorari, remain viable and unaffected by that enactment.

Those reasons were that: (1) conflict exists among the Federal circuits respecting whether state party nominating conventions should be subject to the one man-one vote principle, (2) the degree and impact, if any, the First Amendment of the Federal Constitution has upon state political conventions, without regard to the functions performed by the delegates present at such conventions, and (3) whether litigation contesting the deliberations and conclusions of a state's political party are justiciable controversies. The legislative enactment, limiting the historical role performed at the Delaware State Republican Convention as it pertains to the nomination of elected public officials, does not impact upon the need for a definitive judicial pronouncement to these issues.

Respondent's motion suggests that the legislation has mooted the questions presented in this litigation and that no meaningful controversy remains between the parties. At page nine in their motion, respondents go so far as to speculate that, in light of the recent legislation, it is questionable whether the Republican

Party in Delaware will even, "undertake the considerable expense and effort of even convening a state nominating convention." That statement, like the suggestion of mootness and absence of controversy, ignores the multifarious political functions of Delaware State Republican conventions.

The legislation does not affect the state convention function of selecting the persons to serve as Delaware's delegates to the Republican National Party's quadrennial convention. Neither does it detract from the Delaware State Republican convention function of selecting Delaware's electors to the Electoral College.

The public office holder nominating function, heretofore directly performed at the state convention and now removed by legislation, remains indirectly involved in the state convention process through the selection of Delaware delegates to the Republican National Party's quadrennial convention held for the principal purpose of nominating the Party's candidates for President and Vice President of the United States.

Whether the forum from which a state delegation to a national convention is selected requires adherence to the principle of one man-one vote continues to be in controversy and is not mooted by the recently enacted legislation. Whether a voluntary association of state party people and their deliberations and conclusions during the course of such association, are protected rights within the First Amendment of the Federal Constitution continues to be in controversy within this litigation (and within the Federal circuits) and has not been mooted by an Act of the Delaware Legislature. And finally, whether judicial restraint in matters involving the association of politically motivated individuals intent upon achieving specific political goals

is justiciable continues to be in controversy in this case (and throughout the Federal circuits) and is not mooted by Delaware's legislative enactment.

Petitioners see no merit in the suggestion of yet another remand to the District Court. For if a remand should occur, Petitioners question what case law the District Court could look to for guidance in resolving the remanded issues. Respondents would no doubt urge the District Court to rely upon *Maxey v. Washington State Democratic Committee*, 319 F. Supp. 673 (1970), *Doty v. Montana State Democratic Central Committee*, 333 F. Supp. 49 (1971), *Seergy v. Kings County Republican County Committee*, 459 F.2d 308 (1972), and *Baker v. Carr*, 369 U.S. 186 (1962) as controlling. Petitioners, to the contrary, might be expected to urge the District Court to disregard those cases and rely instead upon *Irish v. Democratic-Farmer Labor Party of Minnesota*, 399 F.2d 119 (1968), affirmed 287 F. Supp. 794 (1968), *Smith v. State Executive Committee*, 288 F. Supp. 371 (N.D. Ga. 1968), *Cousins v. Wigoda*, 419 U.S. 477 (1975), *O'Brien v. Brown*, 409 U.S. 1 (1972) and *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 548 (D.C. Cir. 1975). The opportunity this case affords to the Supreme Court to provide judicial guidance to the various District and Appellate Courts throughout the nation in cases of this type is an

opportunity that should not be procedurally finessed through a selectively expedient claim of mootness.

Respectfully submitted,

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APPENDIX 1

Delaware Republican State Committee, et al.

Rule 2

The State shall be divided into four (4) Convention Districts as follows: The City of Wilmington shall be known as the First Convention District; New Castle County, outside of the City of Wilmington, shall be known as the Second Convention District; Kent County shall be known as the Third Convention District; and Sussex County shall be known as the Fourth Convention District. The Republican State Convention shall consist of two hundred and twenty (220) delegates, with fifty-five (55) percent of the delegates being distributed equally amont the four (4) Convention Districts and forty-five (45) percent on the basis of Republican vote. The distribution shall be made in the following manner: one hundred and twenty (120) delegates shall be distributed on the basis of thirty (30) delegates to each Convention District; one hundred (100) delegates shall be distributed among the Convention Districts on the basis of one (1) delegate for each one (1) percent of the Statewide Republican vote which was cast in each Convention District in the last Presidential election. The Republican vote shall be determined by averaging the vote for the Republican Candidates for State Treasurer and for State Auditor. The State Committee, at its first meeting following each Presidential election, shall fix the number of delegates for each Convention District pursuant to the formula set forth above.